TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 352. 84.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW HAVEN.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

FILED JULY 24, 1905.

(19,854.)

(19,854.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 352.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW HAVEN.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

INDEX.

	Original.	Print.
Writ of error	1	1
Proof of service of writ of error	3	2
Petition for writ of error	4	2
Allowance of writ of error	5	3
Assignment of errors	6	3
Bond on writ of error	22	11
Citation	24	12
Proof of service of citation	25	12
Record from superior court on first appeal (omitted in printing)	27	—
Application (" ")	27	—
Citation (" ")	31	—
Exhibit A—Act concerning permanent pavements in the city of New Haven (omitted in printing)	31	—
B—Report of bureau of compensation as amended (omitted in printing)	33	—
Opinion of corporation counsel (omitted in printing)	12	—
Motion for leave to file motion to strike out (omitted in printing)	40	—

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 23, 1906.

	Original.	Print.
Motion to strike out part of application (omitted in printing)	41	—
Motion for leave to file amendment	42	—
Amendment to application	42	—
Motion to strike out amendment	43	—
Memorandum on motion to strike out	43	—
Demurrer to application	45	—
Memorandum upon demurrer	46	—
Answer	47	—
Amendment to answer	47	—
Memorandum of decision	48	—
Judgment	51	—
Notice of appeal	54	—
Finding	54	—
Exhibit F—Contract and bond	66	—
1—Notice, July 23, 1898	80	—
2—Report of bureau of compensation (omitted in printing)	81	—
3—Report of John Hogan, chairman (omitted in printing)	82	—
4—Report of John Beecher, chairman (omitted in printing)	82	—
5—Resolution presented by W. C. Keane (omitted in printing)	83	—
Defendant's appeal (omitted in printing)	83	—
Bill of exceptions	86	—
Clerk's certificate	89	—
Table of contents	89	—
Opinion on first appeal	91	13
Judgment on first appeal	106	22
Record from superior court on second appeal (omitted in printing)	108	—
Application	108	—
Citation (omitted in printing)	112	—
Exhibit A—Act concerning permanent pavements in the city of New Haven (omitted in printing)	112	—
B—Report of bureau of compensation as amended (omitted in printing)	114	—
Opinion of corporation counsel (omitted in printing)	119	—
Motion for leave to file motion to strike out (omitted in printing)	121	—
Motion to strike out part of application (omitted in printing)	122	—
Motion for leave to file amendment	123	—
Amendment	123	—
Motion to strike out amendment	124	—
Memorandum on motion to strike out	124	—
Demurrer to application	126	—
Memorandum upon demurrer	127	—
Answer	128	—
Amendment to answer	128	—
Memorandum of decision	129	—
Judgment, March 30, 1902	132	—
Notice of appeal	135	—
Finding	135	—

	Original.	Print.
Exhibit F—Contract and bond.....(omitted in printing)..	147	—
1—Notice, July 23, 1898.....(" ")..	161	—
2—Report of bureau of compensation (omitted in printing).....	162	—
3—Report of John Hogan, chairman (omitted in printing).....	163	—
4—Report of John Beecher, chairman (omitted in printing).....	163	—
5—Resolution presented by W. C. Keane (omitted in printing).....	164	—
Defendant's appeal.....(omitted in printing)..	164	—
Bill of exceptions.....(" ")..	167	—
Memorandum of decision, July 31, 1903 (" ")..	170	—
Judgment, March 25, 1904.....(" ")..	171	—
Notice of appeal.....(" ")..	173	—
Finding.....(" ")..	173	—
Plaintiff's appeal.....(" ")..	187	—
Clerk's certificate.....(" ")..	190	—
Table of contents.....(" ")..	190	—
Opinion on second appeal.....	193	22
Judgment on second appeal.....	200	26
Record from superior court on third appeal.....	202	27
Application.....	202	27
Citation.....	206	30
Exhibit A—Act concerning permanent pavements in the city of New Haven.....	206	30
B—Report of bureau of compensation as amended.....	208	31
Opinion of corporation counsel.....	213	35
Motion for leave to file motion to strike out.....	215	37
Motion to strike out portion of application.....	216	38
Motion for leave to file amendment.....	217	39
Amendment to application.....	217	39
Motion to strike out part of amendment.....	218	40
Memorandum of decision on motion to strike out.....	218	40
Demurrer to amended application.....	220	41
Memorandum of decision on demurrer.....	221	42
Answer.....	222	43
Amendment to answer.....	222	43
Memorandum of decision on merits.....	223	43
Judgment of 1902.....	226	45
Defendant's notice of appeal.....	229	48
Findings at trial in 1902.....	229	48
Defendant's claims of law.....	239	56
Exhibit F—Contract between defendant and Boston Asphalt Co. for paving Chapel street between York street and the Boulevard.....	241	57
Bond of Boston Asphalt Co.....	254	67
1—Notice served on plaintiff by bureau of compensation July 23, 1898.....	255	68
2—Report of bureau of compensation on assessments rendered August 1, 1898.....	256	68
3—Report of committee on streets to the common council recommending adoption of assessments made by the bureau of compensation.....	257	69

	Original.	Print.
Exhibit 4—Report of committee on streets to the common council recommending that the reports of the bureau of compensation be referred back to that body	257	70
5—Vote passed by board of aldermen and councilmen instructing the bureau of compensation to levy assessments for permanent pavements	258	70
6—Schedule of items of cost of work done by defendant in connection with construction of pavement in question	258	70
Defendant's appeal, 1902	258	71
Bill of exceptions	261	73
Memorandum of Judge Elder, July 31, 1903	264	75
Judgment, March 25, 1904	265	76
Plaintiff's notice of appeal	267	77
Finding	267	77
Plaintiff's appeal	282	89
Motion for leave to file amendment to application	285	91
Amendment to application	285	91
Memorandum of decision, November 29, 1904	287	92
Judgment, November 29, 1904	288	93
Notice of appeal	290	95
Finding, December 28, 1904	291	95
Claims of law (plaintiff's)	293	96
Claims of law (defendant's)	299	101
Exhibit A—(Not set out here)	300	102
9—Action of the city of New Haven with reference to proposed amendments to paving contract	300	102
Plaintiff's appeal	302	104
Clerk's certificate	304	105
Table of contents	305	106
Opinion on third appeal	308	107
Judgment on third appeal	318	113
Return to writ of error	320	113
Clerk's certificate	321	114
Stipulation to omit parts of record in printing	322	114

1 UNITED STATES OF AMERICA, *ss:*

[Seal of Circuit Court, Connecticut.]

The President of the United States of America, To the Honorable the Judges of the Supreme Court of Errors of the State of Connecticut, Greeting *Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Errors of the State of Connecticut before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Fair Haven and Westville Rail Road Company Plaintiff and Plaintiff in error and The City of New Haven Defendant and Defendant in error wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity;

2 or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Fair Haven and Westville Rail Road Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within Thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26 day of June, in the year of our Lord one thousand nine hundred and five.

E. E. MARVIN,
Clerk of the Circuit Court of the United States for the District of Connecticut.

Allowed by
DAVID TORRANCE,
Chief Justice of the Supreme Court of Errors, Connecticut.

3 STATE OF CONNECTICUT, *New Haven County, ss:*

NEW HAVEN, *June 27th*, 1905.

Then and there I served the within writ of error by lodging a copy thereof, for the adverse party, in the office of the clerk of the supreme court of errors of the State of Connecticut for the third judicial district, which is the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendition of the judgment complained of.

Attest:

WILLIAM E. HIGGINS,
Deputy Sheriff.

Fees.

Travel	125
Sam	12
John	100
Augustus	48
	285

Sworn to before me this 27th day of June, A. D. 1905.

GEORGE D. WATROUS,
Notary Public.

[SEAL.]

STATE OF CONNECTICUT, *County of New Haven, ss:*

JUNE 27TH, 1905.

Then and there I received a copy of the within writ for the adverse party.

Attest: EDWARD A. ANKETELL,
Clerk of the Supreme Court of Errors of the State of Connecticut for the Third Judicial District.

4 Supreme Court of Errors of the State of Connecticut.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Petition for Writ of Error.

To the Honorable David Torrance, Chief Justice of the Supreme Court of the State of Connecticut:

The petition of The Fair Haven and Westville Railroad Company respectfully shows: That on the 20th day of April, A. D. 1905, a judgment was entered in your honorable court in favor of the City of New Haven, defendant in said case and appellee in your honorable court, and the plaintiff, appellant and plaintiff in said court, wherein was drawn in question the construction of certain clauses in the

Constitution of the United States, and the decision was against the right, title and privilege claimed under said clauses of the Constitution,

Wherefore, the said The Fair Haven and Westville Railroad Company, plaintiff in the above entitled cause, does hereby petition for a writ of error from the United States Supreme Court to the supreme court of errors of the State of Connecticut, upon said judgment, for the reasons specified in the assignment of errors which is filed herewith.

Whereupon, said plaintiff prays for the allowance of a writ of error, and for an order fixing the amount of bond for supersedeas in said cause and for such other orders and process as may cause the same to be corrected by the said United States Supreme Court.

5 Dated this 24th day of June, A. D. 1905.

THE FAIR HAVEN AND
WESTVILLE COMPANY,
TALCOTT H. RUSSELL,
By GEORGE D. WATROUS,
Its Attorneys.

Writ of error allowed upon the execution of a bond, with good and sufficient security, in the sum of one thousand dollars, that The Fair Haven & Westville Railroad Company, plaintiff in error, shall prosecute its writ to effect and answer all damages and costs if it fail to make its plea good.

Dated at Derby, this 24th day of June, A. D. 1905.

DAVID TORRANCE,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

6 The Supreme Court of the State of Connecticut, Third Judicial District.

THE FAIR HAVEN & WESTVILLE R. R. Co.
vs.
THE CITY OF NEW HAVEN.

THE FAIR HAVEN & WESTVILLE RAILROAD, Plaintiff in Error,
vs.
THE CITY OF NEW HAVEN, Defendant in Error.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Connecticut, in the above entitled matter, there is manifest error in this, to wit:—

Because the court erred in overruling the claim of the plaintiff in error that said assessment of $36,879 was void and in violation of Article 14 of the Amendments of the Constitution of the United States, as depriving the plaintiff of property without due process of law, and denying to the plaintiff the equal protection of the laws.

First, because the assessment of $36,879 was made without any inquiry or finding of benefit to the Railroad;

2. Because the law under which said assessment was made does not call for any inquiry or finding and is wholly arbitrary;

3. Because as a matter of fact there is no benefit whatsoever to the Road;

4. Because the indirect benefit consisting in the tendency of the pavement to increase the population and consequent traffic
7 in that section of the city is not such a benefit as will sustain an assessment;

5. Because said assessment includes the cost of keeping said pavement in repair and said amount is not separated or separable from the general assessment, and because said cost of repair cannot be made a legal basis of assessment against the Railroad but should be paid from general taxation;

6. Because plaintiff is assessed and compelled to pay from general taxation its proportion of the expense of the paving of said street, and, if subjected to this assessment, is compelled to pay twice for the same thing.

7. Because the plaintiff is bound under its charter and the laws of the state to keep the space between the rails and for two feet on each side in repair, which obligation stands unrepealed, and the plaintiff could not be legally subjected to an assessment for the expense of doing that which it is still bound to do itself.

8. Because it appears from the finding that over the whole of its route on West Chapel Street at least one line of track was in use at the time said street was paved in 1873 or 1874, and said company has been assessed therefor, and because said company cannot again be compelled to pay the cost of paving the space between and for two feet outside of said single line of track, as its obligation thereto is to keep the same in repair only;

9. Because said assessment should be reduced by the cost of constructing the asphalt pavement, in so far as the same relates to its track as laid prior to the passage of the order for such asphalt pavement, inasmuch as it appears that from Howe Street to York
8 Street a single line of track was then in use, and a double track for the greater portion of the distance between Howe Street and Sherman Avenue, and a single track for the remaining distance of its route on Chapel Street. Neither the charter, nor the general law, nor any contract between the company and the city or state, requires paving or repaving any portion of the street for the paving of which it has been assessed.

10. Because the act of 1895, so far as it authorized this assessment against the plaintiff, is void, because it impairs the obligation of the contract with the plaintiff contained in its original charter, Private Acts of 1860, p. 370, which provides that said company shall keep that portion of the streets and avenues through which said road or way shall be laid down, with a space of two feet on each side of their track or way, in good and sufficient repair, without expense to the city or town of New Haven, or the owners of land adjoining said track or way, and said act is therefore in violation of Section 10 of Article I. of the Constitution of the United States;

11. Because said act of 1895, so far as it authorizes said assessment against the plaintiff, is in violation of the contract contained in the amendment to the charter of the Fair Haven & Westville Railroad Company, Private Acts of 1864, p. 655, by which it was authorized and empowered to lay and operate its tracks over the portion of Chapel Street affected by the said assessment, subject to the provision of the 9th section of the original charter of said Company. Said act, so far as it authorized said assessment, is in violation of the Tenth Section of Article I. of the Constitution of the United States;

12. Because neither the 9th section of the original charter of the Company, nor the amendment, nor the act of 1895, section 6 requires the plaintiff to pave or repave any portion of the streets, and the act of 1895 cannot be supported as a change in the form of the obligation.

13. Because the portion of section 9 of the charter of the Company which reads as follows: "The Common Council of the City of New Haven may from time to time establish such regulations in regard to said Railroad as may be required for the paving, grading, sewerage and the laying of gas and water pipes in and along said streets," does not give to the city any power to order pavement or the payment of the expense of pavement by the Road, but means simply that the Railroad shall comply with such rules and regulations as will enable the city to complete its operations of paving, grading, sewerage, and the laying of gas and waterpipes;

14. Because no general statute nor law of this state authorizes any such assessment or the imposition of any pecuniary burden, except when such company has failed and, after order, refused to keep such portion of the street in good and sufficient repair;

15. Because said act of 1895, so far as it affects the Railroad, is not a police regulation. It does not on its face bear any evidence of being such, or to have been governed or dictated by considerations appropriate to a police measure, but, on the contrary, purports to be, and is, a simple revenue measure.

16. Because there is no necessity for such an act to enforce any legitimate police regulation. The provision of the charter of the plaintiff and the act of 1893 require the company to repair and keep the road in good condition. Such a charge could not be justified under the police power, even if the act were so intended, and there was nothing to justify or necessitate such a requirement of the railroad;

17. Because the Special Act approved July 1, 1895, is not a general law imposing a police regulation to protect the public health, morals or safety, nor is it a condition lawfully imposed upon the exercise of the franchise conferred upon the plaintiff, but impairs the obligation of the contract between the state of Connecticut and the plaintiff as contained in the plaintiff's charter and amendments, and is therefore unconstitutional and in violation of Section 10 of Article I. of the Constitution of the United States;

18. Because the Special Act approved July 1, 1895, is not a valid exercise of the police power reserved to the state of Connecticut, in that it arbitrarily imposes a pecuniary burden upon the applicant,

and is not passed to protect the health, morals, or safety of the community, and said special act is therefore unconstitutional and void in that it deprives the applicant of its property without due process of law, and denies it the equal protection of the laws, contrary to the provisions of Amendment XIV. of the Constitution of the United States, and deprives the plaintiff of its property without just compensation, contrary to Section 2 of Article I. of the Constitution of the State of Connecticut;

19. Because the assessment appealed from purports to be, and if of any effect is, an assessment for special benefits to the property of the plaintiff, but if not, it constitutes a statutory obligation to pay money, which cannot be sustained without proof that a payment of this character was, under the circumstances, necessary to protect the public against an unsafe condition of West Chapel Street caused by the presence of applicant's tracks or to operations of its
11 railroad, the burden of proof being on the city;

20. Because an order to a street railway corporation to pay the cost of a pavement which is a direct damage to the corporation cannot be sustained without proof that the track of said company constitutes a nuisance in the highway and that such an order was reasonable and necessary in order to compel the company to respond to its charter and statutory obligations to keep 18 feet of West Chapel Street in repair;

21. Because an act or resolution requiring any individual or corporation to pay a portion of the expense of any public work, or a portion of the expense required to carry on the government of a municipality, or of discharging its ordinary police duties, besides what it is compelled to pay by the general taxation laws, cannot be sustained unless it appear that there is a direct and special benefit to said individual or corporation, or unless it appear that said expenditure is necessary in order to obviate some nuisance or inconvenience for which said corporation or individual is responsible. The plaintiff in this case is not so benefited, nor is the expenditure for which it is assessed in any way necessary to the prevention or removal of any nuisance or inconvenience for which the plaintiff is responsible. Said assessment, therefore, and the act of 1895, so far as it authorizes said assessment, are void and illegal, and take the property of the plaintiff without due process of law and without compensation, and deny to the plaintiff the equal protection of the laws, contrary to the 14th Amendment of the Constitution of the United States;

22. Because said act of 1895, so far as it affects the railroad company, does not purport to be an amendment to the charter of the railroad company and cannot be supported as such;

12 23. Because said act of 1895, if purporting to be an amendment to the charter, would not be valid, and is an attempt to affect the property rights of the plaintiff without due process of law, and as such cannot be justified under the power of amendment;

24. Because the special act approved July 1, 1895, entitled "An Act Authorizing the City of New Haven to Issue Street Pavement

Bonds," cannot be deemed to be an amendment of the applicant's charter for the following reasons:

(*a*) Because it purports to affect the charter of the City of New Haven only.

(*b*) The applicant is not named in said act otherwise than by reference in the phrase "on all streets occupied by the track or tracks of any railroad company or companies," etc.

(*c*) Said act is not a general statute but a special law.

(*d*) It is not in name or effect a police regulation for the health or safety of the public.

(*e*) It is an act special in its character, and imposing a pecuniary burden upon such of the railways of the state only as are within the City of New Haven.

(*f*) It does not appear that said so-called amendment was accepted by the stockholders of the applicant within six months after its passage, or that it is otherwise specially provided in said private act.

(*g*) It does not appear that the applicant appeared or was cited to appear before the General Assembly of 1895 with respect to an amendment to its charter in the manner imposed in said private act.

13 25. Because said act of 1895, so far as it affects the railroad, cannot be supported as a franchise tax. It does not purport to be such, nor is it general in its nature, but lays special burdens upon individual corporations;

26. Because said act of 1895, if considered as a franchise tax, and the assessment thereunder, are void, because they assume to deprive the plaintiff of the benefit of the contract contained in its charter;

27. Because said obligation, if any, imposed upon the applicant under the special act approved July 1, 1895, does not include the right to require the applicant to repave the space between the tracks and two feet on the outer side of the outer rails, when the greater portion of such space is already paved and the applicant has already been assessed therefor;

28. The act of 1895, so far as it purports to authorize the city to impose upon the railroad the cost of paving the space between the rails and two feet on either side, is for the reasons specified in the claims herein above mentioned, in violation of Article XIV. of the Amendments of the Constitution of the United States and section 10 of Article I. of said Constitution, because it deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws.

29. Because the court erred in overruling the claim of the plaintiff in error that said act of 1895 was, so far as it purported to authorize the city to impose upon the railroad the cost of paving the space between the rails and two feet on either side, for the reasons specified in the claims herein above mentioned, in violation of Article XIV. of the Amendments of the Constitution of the United States,

14 Section 10, and Article I. of said Constitution, because it impairs the obligation of the contract with the plaintiff and because it deprives the plaintiff of its property without due process of

law and denies to the plaintiff the equal protection of the laws.

15 Because the court erred in overruling the claims of the plaintiff in error that said act of 1895 was, so far as it purported to authorize the city to impose upon the railroad the cost of paving the space between the rails and two feet on either side, for each of the reasons hereinafter specified, in violation of Article XIV. of the Amendments of the Constitution of the United States, Section 10, and Article I. of said Constitution, because it impairs the obligation of the contract with the plaintiff, and because it deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws.

(*a.*) Because the law under which said assessment was made does not call for any inquiry or finding and is wholly arbitrary.

(*b.*) Because as a matter of fact there is no benefit whatsoever to the road.

(*c.*) Because the indirect benefit consisting in the tendency of the pavement to increase the population and consequent traffic in that section of the city is not such a benefit as will sustain an assessment.

(*d.*) Because plaintiff is assessed and compelled to pay from general taxation its proportion of the expense of the paving of said street, and, is subjected to this assessment, is compelled to pay twice for the same thing.

(*e.*) Because it appears from the finding that over the whole of its route on West Chapel Street at least one line of track was in use at the time said street was paved in 1873 or 1874, and said company has been assessed therefor, and because said company cannot again be compelled to pay the cost of paving the space between and for

16 two feet outside of said single line of track, as its obligation thereto is to keep the same in repair only.

(*f.*) Because said assessment should be reduced by the cost of constructing the asphalt pavement, in so far as the same relates to its track as laid prior to the passage of the order for such asphalt pavement, inasmuch as it appears that from Howe Street to York Street a single line of track was then in use, and a double track for the greater portion of the distance between Howe Street and Sherman Avenue, and a single track for the remaining distance of its route on Chapel Street. Neither the charter, nor the general law, nor any contract between the company and the city or state, requires paving or repaving any portion of the street for the paving of which it has been assessed.

(*g.*) Because the act of 1895, so far as it authorized this assessment against the plaintiff, is void, because it impairs the obligation of the contract with the plaintiff contained in its original charter, Private Acts of 1860, p. 370, which provides that said company shall keep that portion of the streets and avenues through which said road or way shall be laid down, with a space of two feet on each side of their track or way, in good and sufficient repair, without expense to the city or town of New Haven, or the owners of land adjoining said

track or way, and said act is therefore in violation of Section 10 or Article I. of the Contsitution of the United States.

(*h.*) Because said act of 1895, so far as it authorizes said assessment against the plaintiff, is in violation of the contract contained in the amendment to the charter of the Fair Haven & Westville Railroad Company, Private Acts of 1864, p. 655, by which it was
17 authorized and empowered to lay and operate its tracks over the portion of Chapel Street affected by said assessment, subject to the provisions of the 9th section of the original charter of said Company. Said act, so far as it authorized said assessment, is in violation of the tenth section of Article I. of the Constitution of the United States.

(*i.*) Because neither the ninth section of the original charter of the company, nor the amendment, nor the act of 1895, section 6, requires the plaintiff to pave or repave any portion of the streets, and the act of 1895 cannot be supported as a change in the form of the obligation.

(*j.*) Because no general statute nor law of this state authorizes any such assessment or the imposition of any pecuniary burden, except when such company has failed and, after order, refused to keep such portion of the street in good and sufficient repair.

(*k.*) Because said act of 1895, so far as it affects the railroad, is not a police regulation. It does not on its face bear any evidence of being such, or to have been governed or dictated by considerations appropriate to a police measure, but, on the contrary, purports to be, and is, a simple revenue measure.

(*l.*) Because there is no necessity for such an act to enforce any legitimate police regulation. The provision of the charter of the plaintiff and the act of 1893 require the company to repair and keep the road in good condition. Such a charge could not be justified under the police power, even if the act were so intended, and there was nothing to justify or necessitate such a requirement of the railroad.

(*m.*) Because the special act approved July 1, 1895, is not
18 a general law imposing a police regulation to protect the public health, morals or safety, nor is it a condition lawfully imposed upon the exercise of the franchise conferred upon the plaintiff, but impairs the obligation of the contract between the state of Connecticut and the plaintiff as contained in the plaintiff's charter and amendments, and is therefore unconstitutional and in violation of Section 10 of Article I. of the Constitution of the United States.

(*n.*) Because the special act approved July 1, 1895, is not a valid exercise of the police power reserved to the state of Connecticut, in that it arbitrarily imposes a pecuniary burden upon the applicant, and is not passed to protect the health, morals, or safety of the community, and said special act is therefore unconstitutional and void in that it deprives the applicant of its property without due process of law, and denies it the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, and deprives the plaintiff of its property without just

compensation, contrary to Section 2 of Article I. of the Constitution of the State of Connecticut.

(*o.*) Because the assessment appealed from purports to be, and if of any effect is, an assessment for special benefits to the property of the plaintiff, but if not, it constitutes a statutory obligation to pay money, which cannot be sustained without proof that a payment of this character was, under the circumstances, necessary to protect the public against an unsafe condition of West Chapel Street caused by the presence of applicant's tracks or to operations of its railroad, the burden of proof being on the city.

(*p.*) Because an order to a street railway corporation to pay the cost of a pavement which is a direct damage to the corporation
19 cannot be sustained without proof that the track of said company constitutes a nuisance in the highway and that such an order was reasonable and necessary in order to compel the company to respond to its charter and statutory obligations to keep 18 feet of West Chapel Street in repair.

(*q*) Because an act or resolution requiring any individual or corporation to pay a portion of the expense of any public work, or a portion of the expense required to carry on the government of a municipality, or of discharging its ordinary police duties, besides what it is compelled to pay by the general taxation laws, cannot be sustained unless it appear that there is a direct and special benefit to said individual or corporation, or unless it appear that said expenditure is necessary in order to obviate some nuisance or inconvenience for which said corporation or individual is responsible. The plaintiff in this case is not so benefited, nor is the expenditure for which it is assessed in any way necessary to the prevention or removal of any nuisance or inconvenience for which the plaintiff is responsible. Said assessment, therefore, and the act of 1895, so far as it authorizes said assessment, are void and illegal, and take the property of the plaintiff without due process of law and without compensation, and deny to the plaintiff the equal protection of the laws, contrary to the 14th Amendment of the Constitution of the United States.

(*r*) Because said act of 1895, so far as it affects the railroad company, does not purport to be an amendment to the charter of the railroad company and cannot be supported as such.

(*s.*) Because said act of 1895, if purporting to be an amendment to the charter, would not be valid, and is an attempt to affect
20 the property rights of the plaintiff without due process of law, and as such cannot be justified under the power of amendment.

(*t*) Because the special act approved July 1, 1895, entitled "An Act Authorizing the City of New Haven to Issue Street Pavement Bonds," cannot be deemed to be an amendment of the applicant's charter, for the following reasons:

(1) Because it purports to affect the charter of the City of New Haven only.

(2) The applicant is not named in said act otherwise than by reference in the phrase "on all streets occupied by the track or tracks of any railroad company or companies," etc.

(3) Said act is not a general statute but a special law.

(4) It is not in name or effect a police regulation for the health or safety of the public.

(5) It is an act special in its character, and imposing a pecuniary burden upon such of the railways of the state only as are within the city of New Haven.

(6) It does not appear that said so-called amendment was accepted by the stockholders of the applicant within six months after its passage, or that it is otherwise specially provided in said private act.

(7) It does not appear that the applicant appeared or was cited to appear before the General Assembly of 1895 with respect to an amendment to its charter in the manner imposed in said private act.

(*u.*) Because said act of 1895, so far as it effects the railroad, cannot be supported as a franchise tax. It does not purport to be
21 such, nor is it general in its nature, but lays special burdens upon individual corporations.

(*v*) Because said act of 1895, if considered as a franchise tax, and the assessment thereunder, are void, because they assume to deprive the plaintiff of the benefit of the contract contained in its charter.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY,
By TALCOTT H. RUSSELL,
GEORGE D. WATROUS, *Its Attorneys.*

(Indorsement:) Filed June 27th, 1905. Edward A. Anketell, Clerk of the Supreme Court of Errors.

22 Know all men by these presents, That we, Talcott H. Russell of New Haven, as principal, and John W. Edgerton of New Haven, as surety, are held and firmly bound unto the City of New Haven, a municipal corporation organized under the laws of the State of Connecticut in the full and just sum of One Thousand Dollars, to be paid to the said The City of New Haven, certain attorney, executors, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of June, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a session of the Supreme Court of Errors of the State of Connecticut in a suit depending in said Court, between The Fair Haven and Westville Railroad Company and The City of New Haven, a judgment was rendered against the said The Fair Haven and Westville Railroad Company, and the said The Fair Haven and Westville Railroad Company having obtained a writ of error, and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The City of New Haven, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said

The Fair Haven and Westville Railroad Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make plea good, then the above obligation to be void; else to remain in full force and virtue.

23 TALCOTT H. RUSSELL. [SEAL.]
JOHN W. EDGERTON. [SEAL.]

Sealed and delivered in presence of
S. J. PALMER,
EDWARD H. ROGERS.

Approved by DAVID TORRANCE,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

(Indorsement:) Filed June 27th, 1905. Edward A. Anketell, Clerk of the Supreme Court of Errors.

24 UNITED STATES OF AMERICA, *ss:*

To "The City of New Haven" a Municipal corporation duly organized under the laws of the State of Connecticut, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within Thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Errors of the State of Connecticut wherein The Fair Haven and Westville Rail Road Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David Torrance, Chief Justice of the Supreme Court of Errors of the State of Connecticut, this 26th day of June, in the year of our Lord one thousand nine hundred and five.

DAVID TORRANCE,
Chief Justice of Supreme Court of Errors of the State of Connecticut.

25 On this 27th day of June 1905, in the year of our Lord one thousand nine hundred and five, personally appeared William E. Higgins, Deputy Sheriff before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Leonard M. Daggett, Corporation Counsel of the City of New Haven and Edward A. Street, City Clerk of the City of New Haven.

Attest: WILLIAM E. HIGGINS,
Deputy Sheriff.

Sworn to and subscribed the 28th day of June, A. D. 1905.

JOHN S. FOWLER,
Assistant Clerk of the Superior Court for New Haven County in the State of Connecticut.

Fees.

Travel	1.00
Service	.24
Copies	1.00
Endmts.	.48
	2.72

26-90 On this 27th day of June, 1905, in the year of our Lord one thousand nine hundred and five, personally appeared William E. Higgins, Deputy Sheriff before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Leonard M. Daggett, Corporation Counsel of the City of New Haven, and Edward A. Street, City Clerk of the City of New Haven.

Attest: WILLIAM E. HIGGINS,
Deputy Sheriff.

Sworn to and subscribed the 28th day of June, A. D., 1905.

JOHN S. FOWLER,
Assistant Clerk of the Superior Court for New Haven County in the State of Connecticut.

Fees.

Travel	1.00
Service	.24
Copies	1.00
Endmts.	.48
	2.72

91 Supreme Court of Errors, Third Judicial District, New Haven. January Term, 1903.

THE FAIR HAVEN & WESTVILLE RAILROAD CO.
vs.
THE CITY OF NEW HAVEN.

Statutory application for relief from an assessment made by the Court of Common Council of the City of New Haven against the plaintiff on account of the construction of a pavement in one of the city streets, brought to the Superior Court for New Haven County; facts found and judgment rendered reducing the assessment by the court, Shumway, J., and an appeal to this court, by the defendant for alleged errors in the rulings of the court.

Error.

The facts are sufficiently stated in the opinion.

PRENTICE, *J.*:

The plaintiff operates a double track electric street railway through West Chapel Street in the defendant city, and did so at the time of

the improvement in question. In October, 1895, the court of common council ordered said street to be paved for a considerable distance with sheet asphalt. The work of construction began in June and ended in October or November, 1897. This pavement replaced crushed stone and Belgian block pavements which had been laid in portions of the street in years 1873 and 1874 and for which the plaintiff had been assessed. The work was done under a contract between the city and the contractor at a certain price per square yard, and the city paid therefor. The city thereupon assessed against the plaintiff the sum of $36,879 on account of said improvement
92 and expenditure. This sum purported to represent the actual cost to the city of laying so much of said pavement as was embraced within the space covered by the plaintiff's tracks and two feet on each side without. The trial court rejected the rule employed by the city in arriving at the plaintiff's share of the burden of the improvement, which was one claimed by virtue of the provisions of Special Acts of 1895, p. 565, and adopted a radically different and much less favorable rule derived from Special Acts of 1899, p. 181, which imposed an assessment of only $5,823. This rule arrived at its results by treating each side of the plaintiff's tracks as frontage and assessing it at the rate of sixty cents per lineal foot. The real question between the parties is as to the correctness of the defendant's claim as to the rule to be applied.

As the question involved is primarily one of statutory construction, we can best approach it by an examination of the statutory situation. When the work was ordered and constructed, chapter 169 of the Public Acts of 1893 and the Special Act of 1895, p. 565, were both in force. The former Act provided that it should "be the duty of every street railway company to keep so much of the street or highway as is included within its tracks and a space of two feet on the outer side of the outer rails thereof in repair to the satisfaction of the authorities of the city, town or borough which is bound by law to maintain such street or highway." The Act further provided that upon notice or failure to comply the municipal authorities might do the work and recover the expense from the company. The latter Act authorized the defendant to issue its bonds to an amount not exceeding $500,000, the avails of which should be used in paving con-
93 struction only, and providing that all pavements laid by authority of the Act should be laid upon the credit of the city and under its direction and control. It further provided that the city might assess a portion of the cost upon abutting land owners and another portion upon street railway companies. The latter provision was in the following language: "On all streets occupied by the track or tracks of any railway company or companies, said company or companies shall be assessed and shall severally pay to the city the cost of paving and repaving the full length and nine feet wide for each and every line of track of such railway now existing or that may hereafter be laid in any street of said city." The Act then proceeded as follows: "All such assessments on the hereinbefore described abutting land owners and railway companies shall be payable at such

time or times as may be determined by the court of common council."

After the pavement in question was laid and pending proceedings to assess in the manner provided in the Act of 1895, another Act, found in the Special Acts of 1899, p. 181, was passed and went into effect. The first section of this Act provided that the city of New Haven should lay a tax of one mill on the dollar for the paving of streets and that the receipts therefrom and from all other assessments resulting from the construction of street pavements should be expended for the original construction of pavements. The second section provided that "benefits and damages" should be laid and assessed for or against all owners of property abutting upon or adjoining the streets in which the pavement was laid which assessment of benefits should not exceed a certain amount per lineal foot of frontage varying according to the character of the pavement and being sixty cents per foot for asphalt. The fourth section provided that all the
94 pavements should be laid upon the credit of the city and under its direction, and that the assessments should be collectible and payable and liens laid to secure them in the same manner and at the same time as the city taxes. The fifth section provided for a right of appeal from assessments; the sixth that the Act should be regarded as an amendment to the city charter and that all inconsistent Acts should be repealed. The seventh that nothing in the act should prevent the city from issuing bonds for street pavement in accordance with the Act of 1895, and the eighth that the Act should not affect the liability of street railway companies under the general laws. The third section was as follows: "An assessment of benefits and damages to be laid for the pavements already constructed and laid in the city of New Haven upon * * * and West Chapel Streets shall be laid in accordance with and under the provisions of this Act and the property shall be assessed in accordance therewith irrespective as to whether or not brick gutters have been laid on side streets."

One of the controlling questions in this case is as to the effect of the act of 1899 upon the provisions of that of 1895. The plaintiff contends that the latter Act repealed the former; the defendant that it did not. This difference of view explains the situation disclosed by the case. The city bases its claim to the larger sum assessed by it upon the rule of recovery laid down in the act of 1895; the railway company claims to limit its liability at least to the smaller sum assessed by the court upon the strength of the rule of assessment prescribed in the Act of 1899, as interpreted by the court and accepted by the company.

It will be noted that the Act of 1899 contains no negative words and no express repeal of the former act. The
95 only repeal expressed is one of inconsistent Acts and parts of Acts. Such a repeal would have arisen by implication. Hartford *v.* Hartford Theological Seminary, 66 Conn. 475; Braman *v.* New London, 74 Conn. 695. The rule of repeal by implication extends still farther. Wherever a later statute is repugnant in its provisions to those of a prior one, there is a repeal to the extent of the

repugnancy; and wherever a later statute is exclusive, that is, when it covers the whole subject to which it relates, the former is repealed. Hartford *v.* Hartford Theological Seminary, *supra;* United States *v.* Claflin, 97 U. S. 546. Even where the two acts are not in express terms repugnant, yet if the later one covers the whole subject of the former and embraces new provisions plainly showing that it was intended as a substitute for the former, it will operate as a repeal of the former. United States *v.* Tynen, 11 Wall. 88.

By the side of these principles stand others which are of importance when repeals by implication are claimed. Such repeals are not favored and will not be extended beyond the reason therefor, nor presumed where the old and the new may stand together. Windham County Savings Bank *v.* Hines, 55 Conn. 433; Bissell *v.* Dickerson, 64 Conn. 61; Kallaher *v.* Osborne, 37 Conn. 488; Central Ry. & E. Co.'s Appeal, 67 Conn. 197. If both the earlier and the latter statutes can be reconciled, they must stand and have concurrent operation. Goodman *v.* Jewett, 24 Conn. 588; Kallaher *v.* Osborne, 37 Conn. 488; Talcott *v.* Glastonbury, 64 Conn. 575. The repugnancy between the two statutes must be clear and manifest to warrant a court in holding that the later repeals the former. Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149; Middletown *v.* New York, N. H. & H. R. Co., 62 Conn. 492. A statute is not repealed
96 by a later affirmative one containing no repealing clause, unless there is irreconcilable conflict or the later statute is clearly intended as a substitute for the earlier. Red Rock *v.* Henry, 106 U. S. 596; Henderson's Tobacco, 11 Wall. 652. Repeals by implication extend to only so much of the prior statute as is within the reason of the appeal. They are never extended further than the inconsistency compels. New Haven & Fairfield Counties *v.* Milford, 64 Conn. 568. This rule applies where there is an express repeal of inconsistent Acts. People *v.* Durick, 20 Cal. 94. A statute expressly repealing inconsistent Acts will not be held to affect pending cases unless the intention to do so is apparent. Wochlan Township Road, 30 Pa. St. 156; Hickory Tree Road, 43 Pa. St. 139. It might be added, apropos of the facts in this case, that a repeal will not be implied without plain evidence of intention, where the repeal would tend to deprive parties of rights relying upon the faith of which they have acted to their injury in case of repeal.

The act of 1899 contains two entirely severable parts. All its section save the third deal exclusively with future paving construction. The third section alone attempts to deal with that which has been completed. We have no need to inquire whether the Act of 1899 took away from the city the power to thereafter lay new pavements under a bond issue and distribute the expense thereof as provided in the act of 1895. The sole question before us is whether the Act of 1899 deprived the city of the right to collect from the railway company a share of the expense of the completed work upon West Chapel Street in the manner provided by the Act of 1895. It is clear that there is nothing whatever in the first named Act outside of
97 sec. 3 upon which a claim of repeal to this extent can be based. If there is any inconsistency or repugnancy between any of

the provisions of the Act of 1899 and those of the act of 1895 in so far as they relate to any work constructed, or if the first named act so exclusively deals with such work or its incidents as to make manifest an intention to substitute its provisions for those of the prior Act upon that subject matter, this repugnancy or this exclusive treatment must be found within the provisions of said sec. 3. There is but one provision in this section, and that a simple one. It is that any assessment of benefits and damages for the already constructed pavement on West Chapel Street (among others) should be laid and the property owners assessed under the provisions of the Act. That here is a repeal of certain of the authority contained in the Act of 1895 to distribute some of the expense of the West Chapel Street improvement is manifest. In so far as this section reached it creates an irreconcilable inconsistency between its provisions and those of the earlier Act. But how far does it reach? It reaches of course only to the constructed pavements enumerated, of which that in question is one. It reaches only to "assessments of benefits and damages." Do these terms as used include the charge which the city was by the Act of 1895 authorized to make against and collect of the railway company? Whether we look at the natural meaning of the language employed, or interpret it in the light of all the provisions of the Act, the conclusion arises that this section in common with the balance of the Act, exclusive of its last section, professing as it does to treat exclusively of assessments of benefits and damages upon property, and in the second section defining the benefits and damages as those accruing to owners of property abutting the street, makes no attempt to deal with the burden to be borne by the
98 corporations enjoying a public franchise in the street and operating a portion of their respective systems over its surface. It treats of benefits from the improvement as incident to the ownership of adjoining land specially benefited. The charge to be made against the railway companies is regarded as having quite another foundation and character.

It is impossible to read the two acts of 1895 and 1899 together without coming to the conclusion that the purpose of sec. 3 was to alleviate the burden imposed by the earlier Act upon adjoining land owners for the improvements completed and that there was no intention to change the burden imposed upon the railway companies therefor. The act of 1895 was careful to distinguish between the burden to be imposed upon the railway companies and that to be placed upon abutting land owners. The two classes of burdens were imposed by distinct provisions and later described by apt distinguishing language. The Act of 1899, so far as its language goes, deals only with assessments of benefits and damages. Section 2 which prescribes the scope of the Act not only confines its application to such assessments, but also qualifies the assessments as assessments to be made "for or against all owners of property abutting upon or adjoining the streets." Nowhere in the act are railway companies named; nowhere are apt words used to describe them or any share of the expense which they were to bear. It is strange if the Act of 1895 and its distinguishing provisions necessarily called to the attention of the legis-

lature is lost sight of the distinction between land owners abutting the street and railway companies occupying it and the nature of the relations of each to the contemplated improvements, and
99 concealed the companies identity as responsible parties in the descriptive terms of "owners of property abutting upon or adjoining the streets in which the pavements are constructed." We are bound to assume that the legislature used its language intelligently, and it is fair to assume that the use was in the ordinary and commonly accepted sense and to conclude that when it spoke of assessments of benefits upon abutting property owners, it did not intend to embrace within the description parties who were not the owners of land near the improvement and whose property ownership was limited to the rails, ties, poles, wires, &c. which lie in or extend along or over the highway.

It is scarcely to be credited that the legislature had the intention of freeing the railway companies from all liability for the cost of the several paving improvements which had been completed under and upon the faith of the Act of 1895, and yet this was the result of the Act of 1899 if the plaintiff's construction of it is to be adopted, unless indeed its language be given a most liberal and strained construction.

The situation is, we think, susceptible of a simple explanation. The Act of 1899 is to be taken in its natural meaning. Its provisions relating to assessment were intended to deal only with assessments of benefits and damages in favor of or against owners of land whose land adjoins the street in which the pavement is laid by reason of some benefit or damage received affecting its value. The railway companies were not meant to be and are not to be regarded as within their scope. No change in the burden already upon them for the completed work was intended to be effected.

It follows from these observations that there is no such clear and manifest repugnance between the provisions of sec. 3 and
100 those of the Act of 1895 authorizing the rule of assessemnt claimed by the defendant as compels the latter to give way and that the controlling fact of intention to repeal does not appear. The defendant was, therefore, right in his claim as to the rule which the General Assembly had directed should be applied to the situation.

The plaintiff further objects to the application of the rule of assessment against it provided for in the Act of 1895, upon the ground that the provisions of that act authorizing the defendant to charge against the plaintiff and collect from it the cost of the prescribed portion of any new pavement, if in force, would be unconstitutional and void. This objection comes rather late in the history of legislation of this general character and is, we think, not well founded. Plaintiff-counsel discuss the question chiefly as one involving the assessment of benefits by reason of public improvements. We need not stop to inquire whether the objection in this form is one which would be well taken, since it is quite evident, as we have already had occasion to observe, that the legislation in question did not regard the charge to be imposed upon the plaintiff as one of that character, and since constitutional justification for the legislative attempt to impose upon

the plaintiff the burden of a definite portion of the cost of the highway improvement can be otherwise so easily found.

The establishment, maintenance and regulation of highways is within those powers of the state which are commonly designated as police powers. New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650; Jones *v.* Brim, 165 U. S. 180; Hudson County Ry. Co. *v.* Hoboken, 41 N. J. L. 71; Goddard, Petitioner, 16 Pick. 504.

101 In the exercise of this power of highway regulation the state may of itself and directly or through its authorized municipal or other agencies decide what repair or improvement public comfort or safety requires and determine upon whom the burden thereof should reasonably fall. The power of the state in these matters, as in all others involving the exercise of the police powers, is of course not unrestricted. The regulations must be reasonable and the burden must be reasonably cast. The action must not be arbitrary, oppressive, partial, or unequal. Woodruff *v.* Catlin, 54 Conn. 295; New York & N. E. R. Co.'s Appeal, 58 Conn. 532; Goddard, Petitioner, 16 Pick. 504; Borough of Greensburg *v.* Young, 53 Pa. St. 280; North Hudson County R. Co. *v.* Hoboken, 41 N. J. L. 71; Lawton *v.* Steele, 152 U. S. 133.

Within reasonable limits, however, the legislative department is the judge of what the circumstances demand. To this end it is vested with a large discretion and no legislative utterance will be invalidated unless in a clear case. The constitutionality of such legislation will be presumed, and where no reasons are apparent for holding the decision arbitrary, oppressive, partial or unreasonable, the courts will refuse to interfere. Munn *v.* Illinois, 94 U. S. 113; Lawton *v.* Steele, 152 U. S. 133; Powell *v.* Penn, 127 U. S. 678; In this case the legislation and the action under it called for the not unusual proceeding of paving a city street with asphalt. It cast a portion of the attendant burden upon abutting property-owners and another portion upon the corporation which enjoyed the exclusive public franchise of operating a street railway in the street to be paved. The extent of the latter burden was limited to the actual cost of the pavement laid upon that portion of the street which was peculiarly

102 appropriated to the special use of this corporation. Here is no such apparent injustice as to warrant us in saying that constitutional powers have been transgressed.

The constitutional power which upholds this legislation and the municipal action thereunder, is that which has been so frequently appealed to to justify legislative action similar in character whereby the burden of constructing sidewalks, curbs, and gutters has been cast upon abutting property owners; Borough of Greensburg *v.* Young, 53 Pa. St. 280; Paxton *v.* Sweet, 13 N. J. L. 196; Lowell *v.* Hadley, 8 Metc. 180; Brusall *v.* Town of Lebanon, 19 Ohio St. 418; Lewis *v.* New Britain, 52 Conn. 568; whereby property owners have been required to keep the sidewalks in front of their premises clean and free from snow and ice; Goddard, Petitioner, 16 Pick. 504; Kirby *v.* Boylston Market Ass'n, 14 Gray, 249; North Hudson County R. Co. *v.* Hoboken, 41 N. J. L. 71; whereby street railway companies have been compelled to keep their tracks watered. City & Suburban Ry. Co. *v.* Savannah, 77 Ga. 731.

That the act required the plaintiff to pay a specific portion of the cost, or rather the cost of a specific portion of the work, and not an amount to be subsequently ascertained or assessed, is no objection to its legality. New York & N. E. R. Co.'s Appeal, 58 Conn. 532; Doolittle, State's Attorney *v.* Branford, 59 Conn. 402. Neither is the fact that the Act did not provide that the plaintiff should first have an opportunity to itself lay the eighteen foot strip of pavement but was required to pay to the city the cost of that construction by the latter. Such is frequently the case as to one at least of the parties where the work is of such a nature as to be best done as an
103 entirety. New York & N. E. R. Co. *v.* Waterbury, 60 Conn. 1; State's Atty. *v.* Branford, 59 Conn. 402.

Again, the plaintiff is a quasi public corporation, having a franchise from the state to operate a street railway in the street in question, among others. Aside from the power impliedly reserved as incidents of the so-called police power, the state has expressly reserved to itself the power to amend, alter, or repeal the plaintiff's charter. This power of amendment is of course not an unlimited one. What its limits are it is perhaps impossible to precisely define; but it is clear that the power extends so far as to authorize legislation imposing reasonable regulations and requirements upon a corporation operating a railway in a public street as to the manner in which the street may be used by it, the precautions to be observed by it for the public safety and welfare, the condition of repair in which the street shall be kept, the improvements which shall be made therein for the convenience of public travel, and the share of any burden incident thereto which shall be borne by the corporation. The recognized rule upon this subject is well stated in Iceland Fisheries *v.* Holyoke Water Power Co., 104 Mass. 446. "It is sufficient now to say that it is established by adjudications which we cannot disregard and the principles of which we fully approve, that it at least reserves to the legislature the authority to make any alteration or amendment in a charter granted subject to it that will not defeat or substantially impair the object of the grant or any rights which are vested under it and that the legislature may deem necessary to secure either that object or other public or private rights." See Holyoke *v.* Lyman, 15 Wall. 500; New York & N. E. R. Co. *v.* Bristol, 151 U. S. 556.

104 In Shields *v.* Ohio, 95 U. S. 319, the court has this to say concerning the limitations upon the exercise of this reserved power: "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith and be consistent with the scope and object of the Act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations in such cases are surrounded by the same sanctions and are as inviolable as in other cases."

The court in Traction Co. v. Elizabeth, 58 N. J. L. 619, states the practical and legal situation very pertinently as follows: "A street railway company uses as its road bed public streets provided and im-

proved at public expense and acquired and held for the benefit and advantage of the public at large. * * * The legislature in authorizing a street railway company to make use of the public streets, intended that the grantee of such privilege should be subject to municipal regulation of a greater scope than would be allowable in the case of companies occupying and using their own road bed. * * * These companies hold their franchises subject to such municipal regulations as do not unreasonable or unnecessarily interfere with the exercise of the franchises conferred by the legislature."

These principles have their substantial approval in the cases of New Haven & H. R. Co. *v.* Waterbury, 32 Conn. 240.

The Act of 1895 was in effect an amendment to the plaintiff's charter. Bulkley v. New York & N. H. R. Co., 27 Conn. 479; New York & N. E. R. Co. *v.* Waterbury, 60 Conn. 1.

105 Plainly what was required of the plaintiff by the amendment was well within the rule stated and without its limitations.

Incidental objections are made by the plaintiff and discussed in the briefs of counsel, to the assessment made by the city, to wit: (1) That it was without due notice to the plaintiff, and (2) that it included items of expense not involved in the cost of paving the eighteen feet of width chargeable to the plaintiff. The first is not well taken, since the plaintiff was duly notified of the inception of the assessment proceedings before the city officials which proceedings from their beginning to their conclusion, in legal contemplation, formed one continuous proceeding, and at a later stage became a party to them. Gilbert *v.* New Haven, 39 Conn. 467. With respect to the second, it is sufficient to observe that while it is quite possibly true that the city may have included improper items of charge, its claim is not tied to the precise amount of its figures, which it will become the duty of the court below to revise and correct as the facts may require when it comes to apply the proper rule for the determination of the plaintiff's liability.

There is error and the cause is remanded to be proceeded with according to law.

In this opinion the other judges concurred.

106 At a Supreme Court of Errors held at Bridgeport in and for the Third Judicial District, on the fourth Tuesday of October, A. D. 1902.

Present: Hon. David Torrance, Chief Justice; Hon. Simeon E. Baldwin, Hon. William Hamersley, Hon. Frederic B. Hall, Hon. Samuel O. Prentice, Associate Judges.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY, a Corporation Located in the Town of New Haven,

vs.

THE CITY OF NEW HAVEN, a Municipal Corporation, Located in New Haven County.

On Appeal from the Superior Court.

Judgment.

This appeal by the defendant claiming error in the process, record, and judgment, and in the proceedings and decisions of the court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts on file in this Court, was allowed by the Superior Court for New Haven County on the 9th day of June, A. D. 1902, and came to this Court at its term held at Bridgeport on the fourth Tuesday in October, A. D. 1902, when the parties appeared and were fully heard.

And now this Court finds that in the record, judgment, and proceedings of said Superior Court there is error.

It is therefore considered and adjudged that the said judgment be set aside and that said case be remanded to said
107–192 Superior Court, there to be proceeded with according to law, and that the appellant recover of the appellee its costs taxed at $—.

Date of Judgment, January 20th, 1903.

By the Court,

JOHN S. FOWLER,
Assistant Clerk.

193 Supreme Court of Errors, Third Judicial District, June Term, 1904.

FAIR HAVEN & WESTVILLE R. Co.

vs.

THE CITY OF NEW HAVEN.

Application for relief from the action of the court of common council of the city of New Havel in assessing the plaintiff $36,879 for asphalt paving in West Chapel Street in said city, brought to the Superior Court in New Haven County; facts found and judgment rendered confirming and establishing said assessment by the Court, Shumway, J., and an appeal by the plaintiff for alleged errors in the rulings of the court.

Error in part and cause remanded.

Talcott H. Russell and *George D. Watrous,* for the appellant (plaintiff).

Leonard M. Daggett and *E. P. Arvine,* for the appellee (defendant).

PRENTICE, *J.:*

This proceeding, being an application for relief from the action of the court of common council of the city of New Haven in assess-

ing against the plaintiff $36,879 for the cost of certain asphalt paving in one of the streets of the city has once been before this court as reported in 75 Conn. 442. All the questions now presented in so far as they have any foundation in the application for relief, save one, were then either directly or indirectly passed upon. Additional considerations, affecting the constitutional questions involved, have been urged upon us, but we fail to discover therein any reason for revising our former conclusion and now holding contrary thereto that the provisions of the Act of 1895 (12 Special Laws, p. 565), which we said governed the situation in immediate contro-
194 versy, were, as interpreted and applied, unconstitutional.

Few of the facts involved need be again rehearsed. The former appeal was taken by the defendant from an assessment by the court much reducing the amount fixed by the city authorities. Error was found and the cause remanded for reassessment in accordance with a rule therefor contained in said Act of 1895. Upon the former hearing it was urged that the amount originally fixed by the city was improper because it included items of expense not properly a part of the cost of paving the eighteen feet of width chargeable to the plaintiff. With respect to this claim we observed in substance that that question was not properly before us and that it would become the duty of the trial court upon the rehearing of the cause to omit such items, if any there were, from its award. That award having been made and now appealed from by the plaintiff there appears in the reasons of appeal the following assignment of error which presents the new question, to wit, "Because said assessment includes the cost of keeping said pavement in repair and said amount is not separated or separable from the general assessment and because said cost of repair cannot be made a legal basis of assessment against the railroad, but should be paid from general taxation." This assignment, it will be seen, assumes a double aspect involving two inquiries, to wit: (1) whether the award of the court includes an improper item for cost of repair, as claimed, and (2) as to the effect of such inclusion, if any there be.

The city paid to the contractor a certain sum per square yard for laying the pavement and agreeing to keep it in repair for ten years, said agreement being secured by a bond to the city. The
195 award of the court is based upon this sum. It is clear, therefore, that an amount is included which represents cost of repair. The question which remains to be considered in the propriety of the inclusion. An Act was passed in 1897 (12 Special Laws, p. 780) which was clearly intended to meet the situation where pavements are laid with a guaranty as here. It purports to amend the Act of 1895 so that not only the cost of laying a pavement but of an agreement to keep it in repair for a period not exceeding fifteen years might be considered in determining the cost of each square yard which the city might collect of the persons and railroad companies, as provided in said last named Act, which is the Act under which the present charge was made against the plaintiff. If the necessary effect of the execution of the Act of 1897 is to impose upon a street railroad standing in the position which the plaintiff occupied a

double burden arising out of the duty cast by law upon it to keep in repair the specified portion of the highway through which it operates its lines, or if in the application of the Act to the circumstances of the present case such became its effect, it is plain that the action of the court cannot be supported. It is unnecessary to inquire whether conditions might not exist or be created under which the Act might operate not only justly but also favorably to all parties and in violation of no constitutional prohibition. We may well confine our consideration to the conditions and consequences disclosed in the present case. The plaintiff before the statute of 1897 was under the statutory duty of keeping in repair so much of every highway in which its tracks were laid as was included within them and a space of two feet on the outer side of the outer rails thereof. Public Acts of 1893, Chap. 169, Sec. 6. The space thus specified corresponds substantially with that for the paving of which the present
196 judgment requires the plaintiff to pay the city. Liability for all damages resulting from injuries caused by the failure of the plaintiff in its duty to repair was also imposed upon it. Public Acts of 1893, Chap. 169, Sec. 9. This duty and liability have never been removed by express legislation. The Act of 1897 contains no provision for such removal or a conditional or qualified removal. In the absence of any express provision to that effect it can scarcely be presumed that the legislature intended that a resort by the city to the course of action authorized by the Act should with respect to the particular piece of highway involved operate to shift the burden of duty and consequently of liability from railroad to city with all the resulting confusion to the parties and the public with regard to matters of frequently grave concern. The duty and liability for highway care are too serious subjects to be left to be tossed about at the caprice of a municipality and be hidden from the public knowledge without investigation for which the facilities are not readily accessible. Clearly it was never intended that this duty and coextensive liability should depend upon the factitious circumstance of whether a pavement had been paid for in one way or another. The Act of 1897 had its origin without doubt in the notion that the embodiment of a term guaranty in a paving contract was wise as a business proposition, that the benefits of it would accrue alike to all who were responsible for the care of the street, including of course any street railroad, and that the requirement that the railroad company should pay for the cost of so much of the guaranty as related to its share of the paving was one which gave the company value received and in so far as the guaranty was a good bargain diminished rather than increased its burden. The Act was plainly designated
197 to meet a practical situation in a practical way which would be beneficial to all concerned. As plainly there was no purpose underlying it to modify or qualify the duty of a street railway company in the care of a portion of the street or its correspondeng liability as they have been fixed in our general law. From the point of view of the man of affairs the legislative conception was possibly a sagacious one appealing alike to the self interest of both city and company. But there were legal incidents which demanded con-

ideration. The Act at least furnished an authoritative basis for a ourse of action of which company as well as city might wish to avail tself and might by consent, express or implied, avail itself. Whether t also furnished a basis of possible action by the city, the company eing unconsenting, as the result of which payment by the city for guaranty could be recovered from the company for whose benefit t would, if faithfully kept, accrue is the broad question which does ot call for present decision. In the present case we find the com- any, which remains under the duty of maintaining the highway in epair and the liability for the results of non-repair, called upon to ay the cost of an agreement on the part of the third party to do a ertain share of the repairs involved in the statutory duty for a speci- ied term. To this agreement it is not a party. The bond given to se- ure the performance of the agreement does not run to it. By reason f its liability the company has the deepest interest in having its duty one, promptly done, and done according to its judgment of the ecessities and its convenience. It is required to pay for that which nterjects into the situation another's judgment and convenience which are not subject to its control. It is left without obliga-
198 tion to enforce or security of which to avail itself. Thus in no small degree dependent upon the good faith and disposition f one whose interest naturally is to do as little as possible and upon he efficiency of city officials it is compelled to face its duty and re- sponsibility. Surely there is left upon it from the point of view of egal rights some share of the burden which it has been compelled to ay others to assume.

The plaintiff claims that the cost of repair is, upon the facts found, ncapable of separation from the cost of construction and that there- fore the invalidity involved in an award for the former renders any award impossible. The court below ruled otherwise, and the finding shows that such ruling was correct. Sufficient data appears to form the basis of such a separation.

Other claims new to the case are made, to the general effect that as the street had been paved twenty-three years before and the plain- tiff had been assessed a portion of the cost thereof and especially as the city had not shown the need of the new pavement as a means of repair, an unconstitutional use of the Act would result if the present charge against the plaintiff was enforced. These claims have no foundation either in the application or pleadings and therefore have no standing in the case. We do not hesitate to say, however, with- out discussion, that in view of the pleadings, which did not put the plaintiff to the proof of the necessity of the new work as a means of repair and proper maintenance of the street, the facts indicated could not be held sufficient to accomplish the results claimed for them.

There is error in part and the cause is remanded for a
199 deduction from the amount of the assessment confirmed and established by the judgment of the court below of the cost to the defendant of the agreement to repair recited in the finding in so far as said cost related to the pavement for which the plaintiff is charged in said judgment.

In this opinion the other judges concurred.

200 At a Supreme Court of Errors held at New Haven in and for the Third Judicial District, on the first Tuesday of June, A. D. 1904.

Present: Hon. David Torrance, Chief Justice; Hon. Simeon E. Baldwin, Hon. William Hamersley, Hon. Frederic B. Hall, Hon. Samuel O. Prentice, Associate Judges.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY, a Corporation, Located in the Town of New Haven,

vs.

THE CITY OF NEW HAVEN, a Municipal Corporation, Located in New Haven County.

On Appeal from the Superior Court.

Judgment.

This appeal by the plaintiff claiming error in the process, record, and judgment, and in the proceedings and decisions of the court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts on file in this Court, was allowed by the Superior Court for New Haven County, on the 24th day of May, A. D. 1904, and came to this Court, at its term held at New Haven on the first Tuesday in June, A. D. 1904, when the parties appeared and were fully heard.

And now this Court finds that in the record, judgment, and proceedings of said Superior Court there is error in part.

201 It is therefore considered and adjudged that the said judgment be set aside and said case remanded to said Superior Court for a deduction from the amount of the assessment confirmed and established by the judgment of the said Superior Court of the cost to the defendant of the agreement to repair recited in said finding in so far as said cost related to the pavement for which the plaintiff is charged in said judgment, and that the appellant recover of the appellee its costs taxed at $—.

Date of Judgment, August 12, 1904.

By the Court,

JOHN S. FOWLER,
Assistant Clerk.

202 *Applicant's Appeal.*

Supreme Court of Errors, Third Judicial District.

New Haven County, Third Tuesday in January, A. D. 1905.

THE FAIR HAVEN & WESTVILLE R. R. Co.
vs.
THE CITY OF NEW HAVEN.

New Haven County, Superior Court, First Tuesday in September, A. D. 1900.

To the Honorable Superior Court to be held in and for the County of New Haven, in the State of Connecticut.

The application of The Fair Haven & Westville Railroad Company, a corporation duly organized and existing under a charter granted by the General Assembly of the State of Connecticut, and located at New Haven, in the County of New Haven, in said State, respectfully represents:

1. Your applicant owns and operates and for many years has owned and operated an electric street railway in the city of New Haven and elsewhere in the County of New Haven, and owns a certain railway in and upon West Chapel street, in said city, between York street and Norton street, which said railway consists of two tracks, with the ties, bolts, plates, spikes, and other appurteances thereof, and two overhead trolley wires, with the posts and other appurtenances thereof.

2. Your applicant owns no other property whatsoever upon, in, adjoining, or abutting upon said West Chapel street. The length of your applicant's railway in said West Chapel street is 4,852.5 feet, and the width of said street from curb to curb varies from 30 feet, at its narrowest part, to 35 feet, more or less.

3. Your applicant also owns other property in the city of New Haven not used for railway purposes, consisting of land and buildings in various part of said city, and not located on or near said Chapel street, of the value of $—, which property is from year to year subject to taxation, and is taxed by said city for general purposes.

203 4. During the year 1898 the city of New Haven built and constructed a pavement in said West Chapel street, extending from York street to the Boulevard, including all that portion of West Chapel street between York street and Norton street, which said pavement was built and constructed of asphalt.

5. At its January session, 1899 the General Assembly of the State of Connecticut passed what purports to be an Act entitled, "An Act Concerning Permanent Pavements in the City of New Haven," which said Act provided among other things that an assessment of benefits and damages should be laid for the said pavement then already constructed in said West Chapel street, according to the

provisions of said Act. A copy of said Act, approved April 28th, 1899, as the same appears on page 181 of the Special Laws of Connecticut for 1899, is hereto annexed, and marked Exhibit A.

6. The bureau of compensation of said city of New Haven, professing to proceed under and pursuant to said Act, made its report to the court of common council of said city, and recommended that the sum of $11,581.13 be assessed upon the owners of property fronting on said West Chapel street.

7. Of this amount, $5,823 was assessed against your applicant, and the balance, $5,758.13, against the abutting property owners on said street.

8. Said board of compensation in making said assessment, after making allowance for church property, which was deemed not to be benefited by said pavement, and for intersecting streets, assessed the owners of property on either side of said street at the uniform rate of sixty cents per lineal foot, without reference to the depth, locality, or value of the several lots, or to the fact that some of said lots were and others were not built upon, or to the nature or character of the buildings, if any, or to the relative amount of benefits to said several lots of land.

9. The assessment against your applicant was made at the uniform rate of sixty cents per lineal foot, treating your applicant as the owner of a strip of land through the center of said street, and having a frontage on either side of said strip, to wit, at the rate of $1.20 per lineal foot of your applicant's railway, without reference to the benefit to the property of your applicant in said street, to wit, said rails, ties, bolts, spikes, wires, and other appurtenances.

204 10. On April 2d the board of aldermen of said city of New Haven accepted said report, and amended the said recommendation and assessment by increasing the amount assessed against your applicant to $36,879, and not otherwise, and said recommendation and assessment as amended were passed by said board, and on the 23rd day of April, 1900 said recommendation and assessment as amended were duly passed by the board of councilmen of said city, and upon the 30th day of April, 1900 the same were approved by the mayor of the city of New Haven, and upon such approval became under and by virtue of the charter of said city an order of the Court of Common Council of the City of New Haven, a copy of which, with the indorsements thereon, is hereto annexed, and marked Exhibit B.

11. Said sum of $36,879, was the sum claimed by said city to be the cost of repaving with asphalt and of keeping in repair for fifteen years the space between the tracks of your applicant, and for two feet on either side thereof, to wit, a strip 18 feet in width throughout said street from York street to Norton street.

12. Your applicant is informed and believes and therefore avers that said sum includes a portion of the salary of certain city officials, and many other expenditures which are not lawful to be included as a part of the cost of said pavement, or assessable against any property owner under and by virtue of section 83 of the Revised Charter of the City of New Haven, passed at the January session, 1899, which provides in particular that "the whole amount of assess-

ments for benefits by reason of any such work or improvement shall in no case exceed the cost thereof, including the damages payable."

13. Said pavement in West Chapel street does not benefit your applicant's property situated in and upon said West Chapel street, but on the contrary said pavement causes great damage thereto, in that it is difficult and expensive to remove the same when necessary to repair your applicant's said railway tracks and the appurtenances thereof, and to replace said pavement thereafter; and said property is in fact less valuable in consequence of said pavement than it was prior to the laying thereof, at which time there was a crushed stone pavement in said street.

14. Your applicant is not an owner of property "abutting upon or adjoining" said West Chapel street within the meaning of said special law of 1899, and said assessment against your appli-
205 cant and said owners of abutting property is illegal, unjust, unauthorized, excessive, and disproportionate.

15. If your applicant shall be held by the Court to be such an owner of property, said assessment is disproportionate in that although the space which it is by law bound to keep in repair does not comprise in any place more than three-fifths of the whole surface of said street, your applicant is compelled to pay the whole of the sum claimed by the city to be the cost of repaving such portion of the street, including in said amount the sum paid for a guaranty to keep the same in repair for fifteen years, together with the other items unlawfully included as aforesaid, irrespective of the benefits to your applicant's said property in said street, while the total amount paid by all of the other property owners, whose assessments are measured by the front foot, irrespective of benefits, is less than one-sixth of the amount assessed against your applicant, though its railway does not extend between Norton street and the Boulevard, on said West Chapel street; and further, because the aggregate benefits to said property owners exceed the aggregate of their said assessments, and your applicant as a general taxpayer must also contribute to pay to said property owners the benefits which they have received in excess of their said assessments.

16. By said action of the bureau of compensation, and by said order of the court of common council of New Haven, your applicant is aggrieved, because it is thereby deprived of its property without due process of law, its property is thereby taken for public use without compensation, and your applicant is thereby denied the equal protection of the laws, in contravention of the Constitution of the United States, and of the Constitution of the State of Connecticut and of the amendments to said constitutions, respectively.

17. The said city of New Haven threatens and intends to collect the said assessments against your applicant, and impose a lien therefor upon the real estate of your applicant.

Your applicant, therefore, makes this its written application for relief, within thirty days from the approval of said order, according to the statute in such case made and provided, and prays that said order of the court of common council of New Haven, assessing $36,879 against your applicant for the construction of said pave-

ment, may be vacated and annulled, and that the said city
206 of New Haven, its servants and agents, may be enjoined from collecting said assessment, or placing a lien therefor upon the real estate of your applicant, and for such other and further relief in the premises as equity may require.

Dated at New Haven, this 28th day of May, 1900.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY,
By WATROUS & DAY, *Its Attorneys.*

To the Sheriff of the County of New Haven, his Deputy, or either constable of the town of New Haven, Greeting:

By authority of the State of Connecticut you are hereby commanded to summon the city of New Haven, a municipal corporation existing under the laws of the State of Connecticut to appear before the Superior Court to be held at New Haven, within and for the County of New Haven, on the first Tuesday of September, 1900, then and there to show cause, if any it have, why the prayer of the foregoing application should not be granted.

George D. Watrous, of New Haven, is recognized in the sum of $70 to prosecute, etc.

Of this writ with your doings thereon make due return.

Dated at New Haven, this 28th day of May, 1900.

HENRY F. PARMELEE,
Commissioner of the Superior Court for New Haven County.

Exhibit A.

An Act Concerning Permanent Pavements in the City of New Haven.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. The Court of Common Council and the Board of Finance of the City of New Haven shall annually assess upon the grand list one mill on the dollar for the paving of streets, and the receipts from said assessments, and from all other assessments resulting from the construction of street pavements herein provided for, shall only be expended in payment for the original construction of pavements herein enumerated.

Sec. 2. Benefits and damages shall be laid under the con-
207 trol of the court of common council, and assessed by the bureau of compensation of the city, as provided in the charter of said city, for or against all owners of property abutting upon or adjoining the streets on which such pavements are constructed, which assessment for such benefits shall not exceed per lineal foot of frontage seventy-five cents for dimension granite block pavement, sixty cents for asphalt pavement, fifty cents for vitrified brick pavement, and twenty cents for crushed stone pavement, if said bureau shall

find that the property is benefited to at least that amount; provided, however, that no assessment shall be laid unless the granite block, asphalt, and vitrified brick pavements shall each be provided with not less than four inches in thickness of concrete cement foundation, and that all the pavements named be provided with the vitrified brick gutters.

SEC. 3. An assessment of benefits and damages to be laid for the pavements already constructed and laid in the city of New Haven upon Ashmun, Orange, Trumbull, Wooster, and West Chapel streets shall be laid in accordance with and under the provisions of this Act, and the property owners shall be assessed in accordance therewith, irrespective as to whether or not brick gutters have been laid on said streets.

SEC. 4. All pavements laid under the authority of this Act shall be laid upon the credit of the city of New Haven, and under the direction of its court of common council; and said assessments shall be collectible and payable, and liens laid to secure the same, at the same time and in the same manner as are the taxes upon the grand list of said city.

SEC. 5. Any party or parties who shall be aggrieved by any assessment laid against them under this Act shall have the right to appeal to the Superior Court therefrom, as provided for in section 87 of the Charter of the City of New Haven, passed by the General Assembly at its January session, 1897.

SEC. 6. This Act shall be regarded as an amendment to the Charter of the City of New Haven, and all Acts or parts of Acts inconsistent herewith are hereby repealed.

SEC. 7. Nothing herein contained shall prevent the city of New Haven from issuing bonds for street pavements, in acordance with the power conferred by chapter 389, Special Laws of 1895.

208 SEC. 8. This Act shall not affect the liability of street railway companies under the general laws.

Approved April 28, 1899."

EXHIBIT B.

To the Honorable Director of Public Works of the City of New Haven:

The bureau of compensation, to whom was referred the cost of a pavement in Chapel street, from York street to the Boulevard, for the assessments of benefits, and the apportionment of the cost of said pavement among the parties interested therein, respectfully report that they have attended to the duty assigned to them.

That they caused reasonable notice to be given to all persons interested in said public improvement, in all respects pursuant to the provisions of the charter of said city, to appear before them, and be heard in reference thereto, and they fully heard, at the time and place specified, all persons who appeared before them.

We wish to call your attention to the fact of the assessment against The Fair Haven & Westville Railroad Company. We have laid

assessment in accordance with the opinion of the corporation counsel, hereto annexed, marked Exhibit A. Said assessment has been laid under the law of 1899.

They therefore respectfully recommend the adoption of the accompanying order.

All of which is respectfully submitted.

FRED C. LUM,
C. T. COYLE,
F. S. BISHOP,
Bureau of Compensation.

CITY OF NEW HAVEN, *March* 2, 1900.

Ordered, that the sum of eleven thousand, five hundred eighty-one and 13/100 dollars ($11,581.13) be and is hereby assessed upon the owners of property fronting on Chapel street, between York street and the Boulevard, being a proportional and reasonable part of the expense of constructing a pavement in said street.

The name of each party and the amount of benefits assessed against each being herein particularly stated, viz:

	The Yale University Club	$87.00
	Elizabeth M. Judson, wife of Walter Judson	30.60
	William B. Duncan	45.18
209	Ann Louise Gray	23.40
	Catherine A. Mullen	32.10
	Mary A. Mullen Mary Oliver Jardan or Jordon	34.80
	John B. Adriance, Est	37.38
	Henry S. Peck	52.98
	Sophia C. Brown, wife of John H. Brown	21.68
	George A. Alling	29.40
	Frederick S. Porter	45.72
	Henry S. Peck	65.52
	Adelia Guernsey	29.40
	Alonzo B. Hall	48.00
	Morris Steinert	37.50
	Emily B. Upson	38.10
	Margaret A. Fox, wife of Simeon J. Fox	28.80
	Cynthia E. Baldwin, Ad'x Joseph C. Baldwin, Ad'r	28.80
	Mary E. L. Mersick	37.08
	Frederick T. Bradley	45.60
	Franklin S. Bradley	85.80
	Grace E. Allen	15.05
	Augusta E. Stevens	19.86
	Leverett L. Camp	28.50
	Henry F. Peck	29.10
	Otto Hintz, Est. Matilda Hintz, Ex'x	18.00
	Eliza H. Daggett	33.06
	William H. Hull	27.30

Sarah T. Kinney		30.42
Mary E. Scranton		48.00
Dennis Umberfield		30.00
Sarah E. Spencer, wife of Francis E. Spencer		24.00
Ralph A. McDonnell		24.06
Franklin R. Bliss		26.16
Elisha Blackman, Est. Cleveland S. Thompson, Ex'r		31.50
David S. Gamble		30.00
Frederick B. Thompson		30.24
John C. North		47.46
John C. North		30.00
210 Adam Martin Ann E. Martin		33.06
Ella E. Hardy, wife of George E. Hardy		32.40
Agnes H. Gilbert Ella B. Gilbert Levi C. Gilbert	Heirs of Clymena S. Gilbert, Levi C. Gilbert, Ex'r	24.06
Henry H. Guernsey		30.00
Albert D. Judd		60.12
George O. Crutenden		45.06
Fannie C. Platt, wife of Frank S. Platt		42.00
Kate E. Parkhurst, Est. Edward H. Parkhurst, Ad'r		33.00
M. Adelia Platt		28.80
Elbridge L. Howe		30.00
Frank S. Platt		30.00
Alfred E. Blakeslee		30.00
Sarah L. Moulthrop		33.60
Alfred E. Blakeslee		45.30
Betsy G. Sperry		106.14
Henry B. Sargent Laura Sargent Edward R. Sargent Joseph D. Sargent Russell Sargent Ellen P. Sargent George L. Sargent Margaret Sargent John Sargent Elizabeth C. Fenn, wife of Bruce Fenn Mary S. Rice	All children and heirs of Elizabeth C. Sargent, deceased	236.22
Nelson W. Hine		78.00
Asa L. Fabrique		84.00
Julius H. Frost		33.30
Minotte E. Chatfield		36.00
Jason P. Thomson		32.10
Louis Beecher Minnie E. Beecher		38.64
Frederick T. Bradley		36.18

	Minotte E. Chatfield	76.50
211	Perry S. Manville	36.00
	Henry S. Cooper	40.32
	Esther A. Bushnell, wife of Asa C. Bushnell	30.00
	Catherine R. Root	30.00
	Margaret Deibel	30.00
	Mary E. Leighton, Est. / Alton W. Leighton, Ad'r	18.60
	Mary A. Pitts	18.60
	Charles Dickerman, Est. / George L. Dickerman, Ex'r	89.70
	Hannah Start	24.00
	Ellen T. Holbrook / Nathan T. Holbrook	18.00
	Margaret Doyle	21.00
	Silas W. Hart, Est. / Abigail Hart, Ex'x	23.40
	Thomas O'Brien	36.00
	Leonard E. Clark / Lydia M. Clark	19.80
	Antoinette (Sperry) Blair	30.18
	Lockwood Sanford, Est. / Frederick L. Sanford, Ad'r	68.70
	Mary A. Schoonmaker, wife of Peter M. Schoonmaker	30.00
	Amelia Alling / Sarah Alling	35.58
	Prentice W. Chase	36.00
	Harriet S. Cowles	47.10
	Emma J. Bradley, wife of George T. Bradley	31.80
	Franklin S. Bradley	40.20
	Oriana L. Lee, wife of Wilson Lee	31.80
	Wilson H. Lee	30.00
	Francis D. Loomis	18.60
	Nancy M. Pardee	18.90
	Elizabeth M. Babbitt	32.88
	Riley R. Palmiter	28.80
	Lizzie M. Hodgdon, wife of George R. Hodgdon	30.24
	Minnie E. Read, wife of Samuel H. Read	27.84
	Frederick P. Newton, Est. / Jessie E. Newton, Ex'x	160.20
212	Albert S. Holt	63.78
	Edward W. Higby, Est. / Mary D. Woodruff, Ad'x	34.92
	David J. Stiles' Est	109.86
	Caroline M. Hotchkiss	33.60
	Oliva M. Leete, wife of Charles S. Leete	69.60
	Morris Steinert	27.00
	Morris Steinert	33.00
	Nathan S. Bronson	37.20
	Caroline Buckingham	35.64
	Walter C. Skiff	31.32

Phœbe W. Lake	26.70
John E. Geary	42.90
James H. Woodhouse	75.00
Stella S. Chatfield, wife of Minotte E. Chatfield	30.00
Stella S. Chatfield, wife of Minotte E. Chatfield	50.00
Edwin G. Russell	27.18
Thomas W. Corbett	30.06
Mary A. Morgan, wife of Charles L. Morgan	30.06
Wilfred H. Nettleton	30.06
Cordelia Beckley	60.06
Eli Mix	27.90
J. Harmar Bronson	12.00
J. Harmar Bronson	44.70
James A. Davis, William E. Davis	63.78
Thomas M. Flanagan, F. J. Monz	60.00
Simon J. Hugo	24.00
Simon J. Hugo	90.30
Josephine B. Lyon, wife of Richard F. Lyon	72.42
Edward R. Hayes' Est., John C. Hollister, Ex'r and Trustee for daughter, Martha S. Hayes.	27.12
George B. Buckingham	39.00
William N. Parker	30.00
Charles W. Morris	40.80
Samuel L. Bronson	36.00
Pierce N. Welch	54.00
E. Henry Barnes	96.00
Mary J. Munsell	36.00
213 The Grace Hospital Society	111.00
Albert H. Alling	15.60
Rollin S. Woodruff	15.60
Lyman A. Beecher	60.00
Charles M. Walker	15.00
Mary E. Bushnell, wife of Frank C. Bushnell	15.00
Fair Haven & Westville Railroad Company	5,823.00
Frederick T. Bradley	53.40
Minotte E. Chatfield	36.00
	$11,581.13

Corporation Counsel.

Opinion de Assessment of Fair Haven and Westville Railroad Company.

To the Board of Compensation of the City of New Haven.

GENTLEMEN: I am in receipt of you communication of January 26th, in which you ask for my opinion upon the following propositions:

"We have been directed by the court of common council to assess benefits and damages for the laying of an asphalt pavement in West Chapel street. The Fair Haven and Westville R. R. Company have tracks in West Chapel street.

Can we, first, by virtue of section 2, page 181 of the Special Laws of the State of Connecticut, 1899, assess benefits against said railroad company because of its tracks and its use of said street?

Second. Is it possible for us under any law to assess benefits against said company for said tracks and said use of Chapel street?"

In reply I would say the Act known as the "Act Concerning Permanent Pavement in the City of New Haven," approved April 28th, 1899, Special Laws of 1899, page 181, has already received some consideration from me, and I have given an opinion that the Act is retroactive in its effect, and applies to the pavements heretofore laid on West Chapel street.

The second section of said Act provides that benefits and damages shall be assessed by your board, under the control of the court of common council, as provided by the charter "for or against all owners of property abutting upon or adjoining the streets on which such pavements are constructed."

214 The only question remaining is this: Is the Fair Haven and Westville Railroad Company such an owner of property as comes within the above quoted clause? If it is, then said company is liable to assessment, and the same assessment as everybody else, as provided in the Act. If not such an owner, then it cannot be assessed.

If it cannot be assessed under this Act, I would say, answering your second question, it is not possible to assess said railroad company at all.

In the case of the City of New Haven *vs.* The Fair Haven and Westville R. R. Company, 38 Conn., 422, it is held "that the defendant's property [that is, the property of The Fair Haven and Westville R. R. Co.] consists in part of rails, sleepers, ties, and spikes, so laid into and attached to the soil in the street where the improvement was made as to become a part of the realty. That property so situated is real estate had been repeatedly decided. We entertain no doubt that this ought to be regarded as real estate, and as such liable 'to assessment like any other real estate especially benefited, unless there is something in the charter showing that the legislature did not intend that this species of property should be assessed.' "

The Court then goes on to say that finding nothing in the charter, it is subject to assessment like any other property.

Therefore I am of the opinion that the railroad company is the owner of property, and the only question to be considered is whether they own property abutting upon or adjoining the street upon which pavement is constructed.

On this point I am equally clear that the railroad company within the meaning of the act has property abutting upon or adjoining the street.

I am therefore of the opinion that your board has a right to assess

said railroad company exactly as it would any other property holder on West Chapel street.

Respectfully submitted.

A. HEATON ROBERTSON,
Corporation Counsel.

Dated at New Haven, this 6th day of February, 1900.
Adjourned.
Attest: HENRY E. NORRIS,
City Clerk.

215 [Indorsements.]

Report of Department of Public Works.

Bureau of Compensation.

Chapel street pavement, between York street and the Boulevard.
Board of Aldermen, March 5, 1900.
Tabled for printing.

H. E. NORRIS,
City Clerk.

Board of Councilmen, March 12, 1900.
Concurred.

JAMES B. MARTIN,
Ass't City Clerk.

Board of Aldermen, April 2, 1900.
On motion, passed report taken from the table for action. Report amended by striking out of order as reported by the bureau of compensation the amount specified, namely, $11,581.13, and inserting in lieu thereof the amount $42,537.13, and by further amending said report by striking out of the amount of assessment assessed against The Fair Haven & Westville R. R. Co. in said report, namely, $5,823, and by substituting in lieu thereof the amount $36,879, and report as so amended accepted. Order passed and assessments laid, as per amended report.
Attest: H. E. NORRIS,
City Clerk.

Board of Councilmen, April 23, 1900.
Concurred.

JAMES B. MARTIN,
Ass't City Clerk.

City of New Haven, April 30, 1900.
Approved.

C. T. DRISCOLL, *Mayor.*

New Haven County, Superior Court, October 16th, 1900.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

The defendant prays the Court that he may be permitted to file the annexed motion to strike out portions of the plaintiff's application.

CITY OF NEW HAVEN,
By A. HEATON ROBERTSON,
E. P. ARVINE, *Its Attorneys.*

216 Superior Court, New Haven County, October 16th, 1900.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Defendant's Motion to Strike Out.

The defendant moves to strike out the following paragraphs of the application of the plaintiff:

1. Paragraph 3, because the facts stated therein are irrelevant, and because it is immaterial what other property the applicant owns.

2. Paragraph 5, because the same states matters of law and evidential matters, and states no issuable fact.

3. Paragraphs 6, 7, 8, 9, 11, and 12, because said paragraphs contain no allegations of fact relative to the issues, but state merely the alleged motives, claims, and reasons of the city of New Haven, and its agents, which are immaterial and irrelevant; and further, to paragraphs 6, 7, 8, and 9, because it is immaterial what the board of compensation did; and further, for reason that the same contain statements of evidential matters, and matters of law.

4. Paragraphs 14, 15, and 16, because the same are irrelevant, and contain no issuable facts, but only statements of evidential facts, and matters of law incorrectly stated.

6 That Exhibits A and B be stricken out, because the same are irrelevant, and only statements of evidential facts; and especially that the opinion of the corporation counsel be also stricken out, because the same is wholly irrelevant and inadmissible.

THE CITY OF NEW HAVEN,
By A. HEATON ROBERTSON,
F. P. ARVINE, *Its Attorneys.*

[Indorsement:] New Haven County, Superior Court. Filed Oct. 23, 1900. Fowler, Ass't Clerk.

217 Granted Oct. 26, 1900, and motion to strike out filed Oct. 26, 1900.
By the Court,

FOWLER,
Ass't Clerk.

Motion denied March 6, 1901.
By the Court,

FOWLER,
Ass't Clerk.

New Haven County, Superior Court, 7th Day of February, 1901.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Motion for Leave to File Amendment.

The defendant moves for leave to file amendment to the application, a copy of which is hereunto annexed.

By WATROUS & DAY,
Its Attorneys.

New Haven County, Superior Court, 7th Day of February, 1901.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Amendment to Application.

The applicant hereby amends its application by adding thereto after paragraph 10 the following:

10½. Neither the board of aldermen, nor the board of councilmen, nor the mayor of the city of New Haven, nor the court of common council, at any time prior to the doing of the acts complained of, as specified in paragraph 10, gave to the applicant any notice of its purpose to alter or increase said assessment, or of any hearing in relation thereto, and said applicant was not in fact heard by either of said boards, or the mayor, or the court of common council, or any committee thereof, nor was any hearing in fact held by any of said boards or officials as to the amount of benefits to the applicant or to its property by reason of the construction of said pavement, but the increase in said assessment as made by the board of compensa-
218 tion was made arbitrarily and illegally, and the court of common council was not by said private act empowered to alter or increase said assessment.

By WATROUS & DAY,
Its Attorneys.

[Indorsement:] New Haven County, Superior Court. Filed on payment of $5 February 7, 1901. Gallagher, Ass't Clerk.

New Haven County, Superior Court, February 11th, 1901.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Motion to Strike out Allegations of Amendment to Application.

The defendant moves to strike out paragraph 10½ of the amendment to the application, because the allegations thereof do not state any ground of appeal, because they are immaterial and irrelevant, and because said paragraph states conclusions of law, and no issuable facts.

DEFENDANT,
By A. HEATON ROBINSON,
F. P. ARVINE, *Its Attorneys.*

[Indorsement:] New Haven County, Superior Court. Filed Feb. 11, 1901. Fowler, Ass't Clerk.

New Haven County, Superior Court, March 6th, 1901.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Memorandum upon Defendant's Motion to Strike out.

If this was an ordinary appeal from an assessment of bene-
219 fits and damages the questions presented by this motion would be greatly simplified.

It appears that the applicant is seeking to present several questions: first, of an attempt to take its property without due process of law; an attempt to take without compensation; and of an unjust discrimination against it by the municipal authorities of New Haven.

Under these circumstances the applicant should have the benefit of a liberal rule in the statement of its case.

Paragraph 3 of the complaint alleges that the applicant owns other property in the defendant city not used for railway purposes, etc.

It is not clear that there was no reasonable ground for insertion of this allegation; therefore paragraph one of the motion is denied.

Paragraph 5 of the complaint recites that a certain act was passed, etc., upon which it appears in a subsequent paragraph the city authorities professed to act.

While courts must take judicial notice of the Private and Special Acts of the State, yet that portion of paragraph 5 which points out the particular Act in question is well pleaded.

Exhibit A, which is a copy of the Act itself, should not have been introduced, as all statements of facts of which the court will take judicial notice may be stricken out on motion. Therefore paragraph

2 of the motion, so far as it is related to Exhibit A, is allowed, and the remainder denied.

Paragraphs 6, 7, 8, 9, 10½, 11 and 12 of the complaint present questions which ought not to be summarily disposed of on a motion to expunge.

The remedy, if any, as to these paragraphs should be taken by demurrer. Therefore paragraph 3 and that paragraph of the motion relating to 10½ of the complaint is denied.

The allegations contained in paragraphs 14 and 16 are not essential.

If the particular facts set forth in the complaint will support the conclusions of law, or of law and fact set forth in these paragraphs, they are unnecessary.

Upon the other hand, if these particular facts pleaded do not sustain these conclusions they would be unavailing. Paragraph 15 tends to show that the assessment was excessive and disproportionate.

220 Therefore paragraph 4 of the motion relating to paragraphs 14 and 16 of the complaint is allowed, and the remainder denied.

That portion of paragraph 5 relating to Exhibit B is denied.

This exhibit has been referred to and made a part of the report of the bureau of compensation, as appears by paragraph 10 of the complaint, which is unquestioned by this motion.

RORABACK, *Judge.*

[Indorsement:] New Haven County, Superior Court, Filed March 6, 1901. Fowler, Ass't Clerk.

New Haven County, Superior Court, March 11, 1901.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Defendant's Demurrer.

The city of New Haven demurs to certain paragraphs of the application of the plaintiff as follows:

1. To paragraph 3, because it is immaterial what other property the applicant owns.

2. To paragraph 5, because the same states matters of law and evidential matters, and states no issuable fact.

3. To paragraphs 6, 7, 8, 9, 11, and 12, because said paragraphs contain no allegations of fact relative to the issue, and because they state only alleged motives, claims, reasons, and purposes of the city of New Haven, and its agents, which are immaterial and irrelevant; and further, to paragraphs 6, 7, 8, and 9, because it is immaterial what the board of compensation did; and further, for the reason that the same contains statements of evidential matters and matters of law.

4. To paragraph 15, because the same is irrelevant, and contains no issuable fact, but only statements of evidential matters, and matters of law incorrectly stated.

5. Further demurs to paragraph 10½, because the Act concerning permanent pavements of the city of New Haven, sec. 181 of the Special Acts of 1899, provides that hearings upon benefits and damages arising from the laying out of pavements shall be
221 assessed by the bureau of compensation; and because there is no provision in the statutes of the State or in the charter that there shall be any hearing before the court of common council, or any department of the said government, in case that body shall choose to alter the report made by the bureau of compensation; and because the court of common council has power to alter the report made by the bureau of compensation, without allowing any additional hearings to parties interested.

6. The city of New Haven demurs to the relief, because upon this appeal an injunction prayed for cannot lawfully issue.

THE CITY OF NEW HAVEN,
By A. HEATON ROBERTSON,
E. P. ARVINE, *Its Attorneys.*

[Indorsements:] New Haven County, Superior Court. Filed March 12, 1901. Anketell, Clerk. Demurrer overruled April 3, 1901. By the Court, Fowler, Ass't Clerk.

Superior Court, New Haven County, April 3d, 1901.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Memorandum upon Defendant's Demurrer.

Paragraphs 3 and 5 of the complaint have already been disposed of upon the motion to strike out.

Paragraphs 6, 7, 8, 9, 10½, 11 12, and 15 set forth in part the claims of the applicant that by the assessment in question it is deprived of its property without due process of law: that its property is taken for public use without compensation; and that it is denied equal protection of the law.

To raise these various questions the plaintiff is required to specifically state the facts upon which it bases its claims.
222 If the applicant did less, it would be met with objections that it had not set forth the grievance complained of: that courts will not interfere except in cases of fraud, or upon some other ground of equitable jurisdiction; and that the averments of the complaint are not broad enough to entitle it to equitable relief.

That the plaintiff may have an opportunity to fully present its claims in its own way, untrammeled by the artificial rules of pleading, I am inclined to allow all these allegations to stand.

Therefore the demurrer is overruled.

RORABACK, *Judge.*

[Indorsement:] New Haven County, Superior Court. Filed April 3, 1901. Fowler, Ass't Clerk.

Superior Court, New Haven County, April 19th, 1901.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Defendant's Answer.

1. Paragraphs 1, 4, 10 of the complaint are admitted.
2. Paragraphs 2, 5, 6, 7, 8, 9, 11, 12, 13, 14, and 15 are denied.

DEFENDANT,
By A. HEATON ROBERTSON,
Its Attorney.

[Indorsement:] New Haven County, Superior Court. Filed April 19, 1901. Fowler, Ass't Clerk.

New Haven County, Superior Court, October 29th, 1901.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Amendment to Answer.

Defendant hereby amends its answer in said cause by adding thereto the following:

223 3. The paragraph numbered 10½ of the plaintiff's application, being filed by way of amendment on February 7th, 1901, is denied.

DEFENDANT,
By LEONARD M. DAGGETT,
Its Attorney.

[Indorsement:] New Haven County, Superior Court. Filed October 30, 1901. Fowler, Ass't Clerk.

Superior Court, New Haven County, March 30th, 1902.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Memorandum of Decision.

The following facts are admitted or proven:

The applicant, hereinafter referred to as the plaintiff, owns and operates a street railway in the city of New Haven, a part of which railway is in West Chapel street, and is constructed to use an overhead trolley. The plaintiff has no other property abutting on West Chapel street.

The length of the railroad in West Chapel street is 4,852.5 feet, and the width of the street varies from thirty to thirty-five feet.

In the years 1896 and 1897 the plaintiff caused to be laid in West Chapel street an asphalt pavement, extending from York street to the Boulevard, and covering the portion of said street occupied by the railway between York street and Norton street.

After the passage of the Act of 1899, Special Laws of 1899, p. 181, the Bureau of Compensation of the City of New Haven made an assessment of benefits against the plaintiff arising from the construction of said pavement, and made a report to the court of common council of said city, and recommended that the sum of $11,581.13 be assessed upon the owners of property fronting on West Chapel street.

The sum of $5,823 was assessed against the plaintiff, and
224 $5,758.13 against other property owners on said street, making the amount stated.

The assessment as made by the bureau of compensation against the property owners other than the plaintiff was at the uniform rate of sixty cents per lineal foot of frontage upon said street, in accordance with the provisions of the Act of 1899 above named.

The assessment against the plaintiff was an amount equal to $1.20 per lineal foot of railway in West Chapel street, between York street and Norton street.

On the 2d day of April, 1900 the board of aldermen of said city accepted the report of the bureau of compensation, and amended the recommendation and assessment by increasing the amount assessed against the plaintiff to $36,879, and such assessment as amended was passed by said board of aldermen on the 23d day of April, 1900. Said assessment as amended was also passed by the board of councilmen on the 30th day of April, 1900, and the same was duly approved by the mayor of said city.

At no time prior to the acts of the boards of aldermen and councilmen and the mayor of said city in relation to said assessment did the plaintiff have any notice of the purpose or intention of either of said boards or the mayor to change the assessment as made by the bureau of compensation, and the plaintiff was not in fact heard by either, and no hearing was had by either as to the amount of benefits to the property of the plaintiff by reason of the construction of said asphalt pavement in West Chapel street; and said increase in the assessment was made without any consideration of the benefits accruing to the property of the plaintiff by reason of the repaving of said street with asphalt.

The sum of $36,879 as assessed against the plaintiff was the cost to the city of paving with asphalt, and of keeping the same in repair for ten years the space between the rails of plaintiff's tracks and two feet each side, making a strip eighteen feet wide between York street and Norton street. There is included in this cost a part of the compensation of the assistant city engineers, the repairs upon some machinery, and the expenses of a committee of the common council in investigating the methods of street paving.

Before the laying of asphalt West Chapel street was paved with

crushed stone, a part of the expense of laying of which had
225 been paid by the plaintiff. The asphalt pavement in said street benefits the plaintiff only as the improvement in said street may bring an increase in traffic, but is otherwise a damage, in making it more expensive to repair and maintain its track, and keep said street in repair.

These facts comprise in substance the allegations of the complaint, and which the plaintiff deemed sufficient to entitle it to some relief.

It is contended by the defendant that the assessment against the plaintiff is legal and valid under the Act of 1895. Charter of New Haven, page 80.

It is contended by the plaintiff that the Act of 1895 is repealed by the Act of 1899, Special Laws of 1899, p. 181; and if it is not repealed, the Act of 1895 is unconstitutional and void.

Inasmuch as I hold and rule that the Act of 1895 is repealed by the Act of 1899, it is unnecessary to pass upon the constitutionality of the former. The intention and effect of the latter Act is to repeal the former. The last Act covers the whole subject-matter of assessments for benefits and damages arising from paved streets, and provides expressly for the assessments of benefits and damages for pavements already constructed in West Chapel street.

This conclusion entitles the plaintiff to relief from the assessment as laid by the amendment to the report of the bureau of compensation; and it is therefore ordered that the assessment be reduced to the sum of $5,823, as recommended by the bureau of compensation.

SHUMWAY, *J.*

[Indorsement:] New Haven County, Superior Court. Filed March 30, 1902. Fowler, Ass't Clerk.

226 At a Superior Court held at New Haven, in and for New Haven County, on the 30th day of March, A. D. 1902.

Present: Hon. Milton A. Shumway, Judge.

New Haven County Superior Court, March thirtieth, 1902.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY, a Corporation Located in New Haven,

vs.

THE CITY OF NEW HAVEN, a Municipal Corporation.

Appeal from the Court of Common Council of the City of New Haven.

Judgment.

This application for relief from the action of the court of common council in making an assessment against said plaintiff for the cost of a certain portion of an asphalt pavement in West Chapel street, in said New Haven, came to this Court on the first Tuesday of Sep-

tember, 1900, and thence by continuances to the present time, when the parties appeared, and were at issue to the Court on the pleadings, as on file.

The Court having heard the parties finds the following facts:

The applicant, hereinafter referred to as the plaintiff, owns and operates an electric street railroad in the city of New Haven. A part of said railroad is in West Chapel street, and is constructed to use an overhead trolley. The plaintiff owns no other property abutting on or adjoining West Chapel street. The length of the railroad in West Chapel street is 4,852.5 feet, and the width of the street varies from thirty to thirty-five feet between the curbs. Said railroad on Chapel street is located between York street and Norton street.

In the years 1896 and 1897 the defendant caused to be laid on West Chapel street a pavement of asphalt, extending from York street to the Boulevard, and covering that part of the street occupied by the railroad between York street and Norton street.

After the passage of the Act of 1899, approved April 28th, 1899, and printed on page 181 of the Special Laws of Connecticut for 1899, the Bureau of Compensation of the City of New Haven, acting under said Act, and after due notice and hearing of the parties in interest as to benefits and damages, made a report to the court of common council of said city recommending that the sum of $11,581.13
227 be assessed upon the owners of property fronting on Chapel street, including the plaintiff, and assessing against the plaintiff of said amount the sum of $5,823, and $5,758.13 against other property owners of said city, making the amount stated.

The assessment as made by the bureau of compensation against the property owners other than the plaintiff was at a uniform rate of sixty cents per lineal foot of frontage upon said street, in accordance with the provisions of said Act of 1899. The assessment against the plaintiff was an amount equal to $1.20 per lineal foot of railroad in West Chapel street, between York street and Norton street, being .60 per foot on each side of the track and right of way of the plaintiff.

On the 2d day of April, 1900 the board of aldermen of said city accepted the report of the bureau of compensation, and amended the assessment by increasing the amount assessed against the plaintiff to $36,879, and thereupon passed the assessment as amended on the 23d day of April, 1900, which action was concurred in by the board of councilmen on the 30th day of April, 1900, and duly approved by the mayor of said city.

At no time prior to the actions of the boards of aldermen and councilmen and the mayor of said city in relation to said assessment did the plaintiff have any notice of the purpose or intention of either of said boards or the mayor to change the assessment as made by the bureau of compensation, or to change the method of ascertaining the assessment, and the plaintiff was not in fact heard by either, and no hearing was had by either as to the amount of benefits to the property of the plaintiff by reason of the construction of said asphalt pavement in West Chapel street, other than the hearing

before the bureau of compensation under said Act of 1899, and said increase in the assessment was made by the common council without any consideration of, and without reference to, the benefits accruing to the property of the plaintiff by reason of the repaving of said street with asphalt.

The sum of $36,879 as assessed against the plaintiff was the sum computed as the cost of paving with asphalt, and of keeping the same in repair for ten years, the space between the rails of plaintiff's tracks and two feet on each side, making a strip eighteen feet wide between York and Norton streets. Said computation of such cost was made by taking the whole assumed cost of the laying of the pave-
ment and keeping the same in repair for ten years in West
228 Chapel street, and assessing to the railroad the same proportion of said amount which the number of feet between the rails and two feet on each side thereof bore to the whole number of square feet of pavement. The sum assumed as the whole cost of the pavement included a portion of the compensation of the assistant city engineers and of certain inspectors, which assistant city engineers and inspectors were employed by the city at regular salaries, and employed not only upon this work but upon other work of the city; also, repairs upon and depreciation of machinery owned by the city, and the expense of a committee of the common council which was sent to Boston and other cities to ascertain what was the best pavement.

Before the laying of the asphalt pavement West Chapel street had been paved partly with crushed stone, and partly with Belgian block, and the plaintiff had been assessed under the head of benefits, and had paid a portion of the expense of the laying of said pavement.

The asphalt pavement in said street is not a direct benefit to the plaintiff or its property, but on the other hand is a direct damage to the plaintiff and its property, inasmuch as it largely increases the expense of repairing the roadway between the rails, and of general repairs to the track, ties, and structure of the railroad. The only benefit to the railroad is such as results from the general improvement to the locality by reason of such pavement tending to increase the population and traffic in that section of the city. Such benefit does not exceed the amount of $5,823.

Whereupon it is adjudged that said assessment of $36,879 against the plaintiff be reduced to the amount of $5,823, and be vacated and annulled as regards all said amount over and above said sum of $5,823; and that the city of New Haven, its servants and agents, be enjoined from collecting any portion of said assessment, and from placing a lien upon the real estate of the plaintiff for any portion of said assessment, except said sum of $5,823; and that the applicant, said The Fair Haven & Westville Railroad Company, recover of the defendant, the city of New Haven, its costs, taxed and allowed at — dollars and — cents.

Date of Judgment, March 30th, 1902.

SHUMWAY, *J.*

From this judgment the defendant appeals to the next term of the Supreme Court of Errors, to be held at Bridgeport, in and

229 for the Third Judicial District, on the fourth Tuesday in October, A. D. 1902: and Leonard M. Daggett, Esq., of New Haven, is recognized in the sum of $70, conditioned that the defendant shall prosecute said appeal to effect, and pay all costs therein if it shall fail so to do.

New Haven County, Superior Court, April 2d, 1902.

FAIR HAVEN AND WESTVILLE RAILROAD COMPANY
vs.
CITY OF NEW HAVEN.

Defendant's Notice of Appeal.

Notice is hereby given that the defendant appeals from the judgment in said cause to the Supreme Court of Errors in and for the Third Judicial District.

THE CITY OF NEW HAVEN,
By LEONARD M. DAGGETT,
E. P. ARVINE, *Its Attorneys.*

[Indorsement:] New Haven County, Superior Court. Filed April 2, 1902. Fowler, Ass't Clerk.

Superior Court, New Haven County.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY
vs.
CITY OF NEW HAVEN.

Finding.

1. The plaintiff company was in November, 1897, at the time the pavement hereinafter mentioned was completed, and is now, maintaining and operating a double track road in West Chapel street, in the city of New Haven, westerly from York street to Norton street. The said line is a branch of the general system of the company, and connects with the other tracks of the system at the corner of York and Chapel streets, and extends from the corner of
230 Norton and West Chapel streets through Norton street to Derby avenue, and thence out Derby avenue, over West river, past the property known as the Yale Field. The length of the line from York street to Norton street is 4,852.5 feet. The road is operated by an overhead trolley.

2. The width of West Chapel street varies from 30 to 35 feet. The trackway is double tracked, and the width of each line of track, including 2 feet on either side thereof, is 9 feet, making the width of the total line of track, with 2 feet on the outer side of the outer rails, 18 feet in all.

3. By an order approved by the Mayor of the City of New Haven on October 1st, 1895, it was duly ordered by the court of common

council that the board of public works cause West Chapel street between York and Nott streets to be paved its full width with sheet asphalt, equal in quality with the best pitch lake asphalt. The street referred to in said order as Nott st*eet*, otherwise known as the Boulevard, intersects West Chapel street some little distance, namely, about two city squares, beyond and westerly of Norton street.

4. For the purpose of paying for such pavement and other similar pavements constructed at about the same time an issue of bonds was duly made by the city, as authorized by the Special Act approved July 1st, 1895, and the expense of the pavement in West Chapel street was paid from the proceeds of said bonds.

5. On June 4th, 1896 a contract was made between the city and The Boston Asphalt Company for the construction of said pavement in West Chapel street, a copy of which contract is hereto annexed, marked Exhibit F.

6. The actual construction of said pavement was begun in June, 1897, and the same was completed in October or November, 1897.

7. At the time when said pavement was ordered, on October 1st, 1895, the line of the plaintiff company was single track from York street to Norton street, with long turn-outs or switches, which had been constructed by the consent of the city. While said pavement was being consertucted, and in anticipation of its completion, the plaintiff company by consent of the city took up its single track between Howe and York streets, and put down a line of double track. Between Park and York streets such double tracking
31 was constructed at the same time the pavement was being laid between the same streets. Between Park and Howe streets such double track was constructed not more than two or three weeks before the pavement between said streets. During the construction of the pavement, and in anticipation of its completion, the plaintiff company for a large part of the distance covered by its double turn-outs took up the old rails, and relaid the track with a new and better rail.

8. By the contract the price per square yard of such pavement, namely, $3.30, included both the cost of original construction and the cost of maintaining in repair for a period specified by the contract, and the cost of contsruction and repair was not in said contract separated, but a definite portion of such price, namely, 37 cents per square yard, was the amount figured by The Boston Asphalt Company as the cost of maintaining said pavement in repair as required by the terms of the contract.

9. Before the construction of said pavement, and before the enactment of the Special Act approved March 24th, 1897, a proposed amendment of the contract was submitted to the court of common council, with the assent of The Boston Asphalt Company, by which amendment it was proposed to add in paragraph (*m.*) of the contract after the word, "namely," the following words, to wit: "for the original construction of each square yard of surface of roadway paved, the sum of $2.93; and for the cost of keeping said pavement

in repair for the term of ten years, the sum of 37 cents per square yard."

10. The pavement throughout the whole width and length of the street so paved was wholly constructed by The Boston Asphalt Company and by the city, and the expense thereof was wholly paid by the city, and no part of the work of construction was performed by or at the expense of the plaintiff company.

11. After the completion of said pavement the fact of its completion and the expense thereof were duly reported by the director of public works, and on or about February 7th, 1898 an order was made by the court of common council directing an assessment for the said pavement and certain others constructed at about the same time. Said order was transmitted to the bureau of compensation by the director of public works on February 14th, 1898.

12. On July 26, 1898 the bureau of compensation held a session for the purpose of hearing those persons who might present
232 themselves to be heard in relation to assessment of benefits for the construction of said pavement, at which many owners of property on West Chapel street appeared, and objected to the laying of assessments in accordance with the terms of the Act approved July 1st, 1895.

13. On July 23rd, 1898 notice was served upon the plaintiff company that the bureau of compensation would meet on July 29th, 1898, and give persons interested an opportunity to be heard concerning assessments for such pavement, a copy of which notice, giving the amount of the proposed assessment, $36,879, is hereto annexed, marked Exhibit 1.

14. On July 29th, 1898 in accordance with said notice the bureau of compensation met, but no one appeared at said hearing, or at the hearing of July 26th, representing the plaintiff company.

15. The bureau of compensation inquired of the corporation counsel as to the rule which they should adopt in making the assessment, and whether they could make any exception based upon the degree of benefit received, and were advised by him that the Special Act of 1895 was mandatory, that the bureau had no discretion, and that they must take the figures of cost, and assess them arbitrarily to the persons and corporations named in the Act, in accordance with frontage or dimensions, by the rule fixed by said Act of 1895, which is the Act found printed in the Special Acts, Vol. XII, page 565. And thereupon said bureau of compensation proceeded to make assessments in accordance with said rule. Many persons appeared, and objected to the assessment in accordance with said rule; but said bureau of compensation announced that it was governed absolutely by said statute, and would hear no evidence in regard to benefits or damages, and proceeded, without reference to, or considering, benefits or damages.

16. On August 1st, 1898 the bureau of compensation duly rendered a report of its assessments for said pavement, a copy of which said report is hereto annexed, marked Exhibit 2.

17. On or about August 8th, 1898 the board of aldermen and councilmen referred said report of the bureau of compensation, Ex-

ibit 2, to the joint standing committee of the common council nown as the committee on streets.

18. On August 18th, 1898 said committee on streets held a
33 public hearing upon said report, and other matters pending before said committee, notice of which hearing was duly iven by public advertisement in the newspapers, stating the matters hich would be heard and considered at said hearing.

19. Thereafter said committee on streets voted to recommend the doption of said report of the bureau of compensation, and on or bout September 6th made report to the common council, a copy of hich report is hereto annexed, marked Exhibit 3.

20. The report of the committee on streets, Exhibit 3, including s a part thereof the report of the bureau of compensation, Exhibit 2, was from September 6th, 1898, the date of its submission to the ommon council, to December 12th, 1898 the subject of disagreement nd nonconcurrent action of the boards of aldermen and councilmen, and on December 12th, 1898 by concurrent vote of said boards as referred to a special joint committee.

21. Said report, Exhibit 3, including therewith report of the ureau of compensation, Exhibit 2, remained pending before said pecial committee and said boards until after the enactment of the Special Act approved April 28th, 1899, namely, until June 12th, 1899, when by concurrent action of the boards of aldermen and councilmen said report was referred to the joint standing committee of the common council known as the committee on streets.

22. Said committee on streets held a public hearing on August 4th, 1899 concerning said matters referred to them, notice of which hearing was duly given by public advertisement in the newspapers, stating the matters to be heard and considered at said meeting.

23. Said committee thereafter voted to recommend that the report assessing benefits and damages for said pavement be sent back to the bureau of compensation for a new assessment, and duly made their report to the common council on or about September 5th, 1899, a copy of which report is hereto annexed, marked Exhibit 4.

24. By a concurrent vote of the boards of aldermen and councilmen on September 11th, 1899 said report, Exhibit 4, was accepted, and the recommendations thereof adopted.

25. On September 15th, 1899 said report of the committee on streets, Exhibit 4, together with the report of the bureau of
234 compensation, Exhibit 2, was received by the bureau of compensation.

26. On September 15th, 1899 there was also received by the bureau of compensation a resolution which had been presented to the common council, and had been by concurrent action of the boards of aldermen and councilment referred on September 5th, 1899 to the bureau of compensation, a copy of which resolution is hereto annexed, marked Exhibit 5.

27. On February 20th, 1900 the bureau of compensation duly held a public hearing concerning the assessments for said pavement, and other similar pavements, at which hearing a representative of the plaintiff company appeared, and objected to any assessment

against the plaintiff company, claiming that said pavement was a detriment to the business of the railroad company.

28. Said bureau of compensation on March 2d, 1900 duly rendered its report, making assessments for said pavement, which report is made a part of the complaint in this action, and marked therein Exhibit B, by which report the plaintiff company was assessed $5,823 of the cost of said pavement.

29. Said report of the bureau of compensation was transmitted in due course to the common council, and came before that body in April, 1900, and thereupon the following motion was passed: "Report amended by striking out of the order as reported by the bureau of compensation of the amount specified, namely, $11,581.13, and inserting in lieu thereof the amount $42,537.13, and by further amending said report by striking out the amount of assessment assessed against The Fair Haven and Westville R. R. Company in said report, namely, $5,823, and by substituting in lieu thereof the amount $36,879, and the report as so amended accepted, orders passed, and assessments laid, as per said report."

30. The total cost of said pavements as reported by the director of public works was $93,787.49. This included $82,391.52 paid The Boston Asphalt Company under the terms of its contract hereinbefore set forth, and also certain other items, being the cost of work done by the city in connection with the construction, all of which items are set forth in a schedule, a copy of which is hereto annexed, marked Exhibit 6. In the copy of the schedule, Exhibit 6, are included only such items as relate to the West Chapel street pavement.

In said schedule were similar items under each of the head-
235 ings, Orange street, Ashmun street, Wosoter street, and Trumbull street. Certain of these items, other than the amount paid the contractor, were obtained by apportioning expense incurred on account of the several pavements named to each of such pavements proportionally to the number of square yards of pavement laid.

31. The amount assessed against the plaintiff company, $36,879, was obtained by dividing the total cost of the pavement as shown in Exhibit 6 by the number of square yards laid in West Chapel street, to obtain the cost per square yard, which was $3.30, and then calculating the cost at $3.30 per square yard of the pavement in a strip 18 feet in width for the total line of the plaintiff company's track in West Chapel street.

32. The amount assessed upon the plaintiff company by the bureau of compensation in their report, which is annexed to the complaint, and marked Exhibit B, was obtained by assessing the plaintiff company 60 cents per lineal foot for each line of track in said street.

33. At no time prior to the acts of the boards of aldermen and councilmen and of the mayor of said city, set forth in paragraph 10 of the complaint, in relation to said assessment did the plaintiff have any notice of the purpose or intention of either of said boards or the mayor to change the assessment as made by the bureau of compensation in its report which was by said action amended, and the plaintiff was not in fact heard by either of said boards or by the

mayor as to such contemplated change or amendment, and no hearing was had by either of said boards or the mayor as to the amount of benefits to the property of the plaintiff by reason of the construction of said asphalt pavement in said West Chapel street, other than the hearings had before the bureau of compensation and the committee on streets, as hereinbefore set forth. It did not appear in evidence that such increase in the assessment, as set forth in paragraph 10 of the complaint, was made for any consideration of the benefits accruing to the property of the plaintiff by reason of the repaving of said street with asphalt, otherwise than as such consideration appears by the several acts of the boards of aldermen and councilmen and their committees and of the bureau of compensation, as hereinbefore set forth.

34. Before the construction of the pavement in West Chapel street said street had been paved in part with crushed stone, and
236 in part with Belgian blocks. The total cost of that portion of the pavement formerly laid between Howe and York streets was $7,157.07, of which sum there had been assessed in 1873 against the plaintiff company $1,089.27, and against property owners other than the plaintiff company, $3,578.34, and the city had been charged with the balance, namely, $2,489.46.

35. The total cost of that portion of the pavement formerly laid between Howe Street and Sherman avenue was $18,091.21, of which amount there had been assessed in 1874 against the plaintiff company the sum of $2,755.82, and against property owners other than the plaintiff company $8,176.61, and the balance had been paid by the city, namely, $7,158.83.

36. A sheet asphalt pavement is not in general well suited for use in a street where there is a street railway. In the case of West Chapel street is was no direct benefit to the plaintiff or its property, but, on the other hand, was a direct damage, inasmuch as it increased the cost of maintaining and operating the railroad in various ways, and in particular by increasing the expense of keeping the pavements in repair between the rails and two feet on each side, and also increased the expense of repairs to the roadbed, ties, and tracks of the plaintiff. The only benefit to the plaintiff was indirect, and consisted in the tendency of such improvement of a street to increase the population and consequent traffic in that section of the city. No evidence was offered that such benefit exceeds the sum of $5,823.

37. The plaintiff company at all of the times named in this paragraph has not owned or held any property in West Chapel street other than the line and lines of track, as hereinbefore set forth, and the wires, poles, and other similar equipment for operating cars thereon by overhead trolley.

The following rulings were made on the trial:

38. On the trial the plaintiff offered in evidence the original report of the bureau of compensation dated March, 1900, being the report which was amended as set forth in paragraph 10 of the complaint, with the indorsement thereon of the board of aldermen and the board of councilmen and the approval of the mayor, together with a copy of the opinion of the corporation counsel of the city of

New Haven, which opinion had been rendered to the bureau of compensation, and was by said bureau of compensation transmitted with said report to the court of common council. The
237 defendant objected on the ground that while it was proper to show that the bureau of compensation made a report, yet the matters contained in such report were immaterial and irrelevant: that if the sum assessed by the common council was the cost of the pavement for nine feet in width for each line of track, the assessment was in fact valid, and that no evidence offered by the plaintiff should be admitted except evidence offered to show that the assessment laid was not in fact, or did not truly represent, the cost of the pavement, or that the cost of the pavement had been obtained by including therein erroneous or wrongful items of expense. The evidence was, however, admitted, as tending to prove the allegations of the complaint, defendant duly excepting.

39. Plaintiff offered in evidence the resolution referred to in paragraph 26 of the finding, Exhibit 5, for the purpose of showing that the assessment complained of was a new assessment, made under the Act of 1899, without notice to the plaintiff, or an opportunity to the plaintiff to be heard thereon. Defendant objected on the same ground as before, but said evidence was admitted, defendant duly excepting.

40. The plaintiff offered the record of the bureau of compensation making the report concerning the as-essment of benefits referred to in paragraph 15 of this finding, together with a copy of the opinion of the corporation counsel of the city of New Haven, which opinion had been rendered to the bureau of compensation, and was by said bureau transmitted with said report to the court of common council, which opinion of the corporation coun*cil* was as follows:

"NEW HAVEN, CONN., *April* 1, 1898.

Hon. William S. Beecher, Director of Public Works.

DEAR SIR: In regard to your communication, dated March 3d, in regard to the powers of the bureau of compensation in assessing against the property owners for pavement under the Act of 1895, would say: the statute which allows the assessment fixes the rule for assessment, and gives the bureau of compensation, in my opinion, no discretion in the matter. The rule is clear and exact, and should be applied to each property owner.

Respectfully submitted. WILLIAM H. ELY,
Corporation Counsel.

238 This opinion referred *tongire then be ts which wethe assessmen* made on Chapel street and several other streets in the city of New Haven under said Act of 1895. Plaintiff offered this testimony for the purpose of showing the whole record of the proceedings. Plaintiff subsequently offered the direct evidence of members of the bureau of compensation that they exercised no discretion in the matter of the assessments, and did not consider the matter of benefits and damages to the various parties assessed. To the admission of the opinion of the corporation counsel defendant objected on

the ground that it was not material whether the bureau had used their discretion, or not; to which ruling defendant duly excepted.

41. John K. Punderford, a witness produced by the plaintiff, the engineer of the plaintiff company, who had supervision of the repair of tracks and pavements, was asked by plaintiff's counsel the following question: "Will you explain, if you please, what pavement, if any, existed in West Chapel street between the rails of the track prior to the passage of the Act under which the asphalt was laid?" Defendant objecting, plaintiff claimed question to prove that the asphalt was not, and in its nature could not be, a benefit to the street railroad company: that the pavement which existed before the asphalt was laid was more beneficial to the street railroad company than the asphalt pavement; and defendant objected on the ground that the matter of benefits had been conclusively determined by the legislature: that it was not in the power of the court to inquire further as to the benefits to the company of this pavement. The testimony was, however, admitted, plaintiff duly excepting, and the witness proceeded to state what pavement had existed between the tracks, and the condition of such pavement, in response to such question.

42. Plaintiff offered in evidence certain records of the Court of Common Council of the City of New Haven, showing the assessments laid upon the plaintiff company for the construction of crushed stone pavements in West Chapel street in 1873 and 1874, as set forth in the finding. The evidence was offered by plaintiff to prove that the Act of 1895 and any assessment made thereunder for the West Chapel street pavement was unconstitutional, because it imposed unequal burdens upon the plaintiff company and other property owners, in that there was a difference made by the terms of the Act between those property owners who had paid prior
239 assessments and those who had not, and no such allowance was made because of prior assessments upon the railroad company. The evidence was admitted, defendant duly excepting.

43. Allen Maxcy Hiller, a witness produced by plaintiff, who was president of the bureau of compensation in 1898, and who signed the report of said bureau of compensation hereto annexed, marked Exhibit 2, which report had been introduced in evidence by plaintiff, was asked by plaintiff's counsel this question: "In making this assessment under the Act of 1895 on West Chapel street, did you take into consideration at all the benefits or damages to the property owners or the railroad, or did you make it entirely in accordance with the measurements"? Defendant objected, and the question being admitted the witness answered: "No, sir: the bureau did not consider the question of benefits in the slightest degree. They followed the opinion of the corporation counsel, and considered the order of 1895 as mandatory, and allowed the board no discretion in the circumstances." The question was claimed by the plaintiff to show that the bureau of compensation did in fact determine the amount of assessments arbitrarily, and without consideration of benefits and damages; and the defendant objected that the action of the board could not be shown by the testimony of its individual

members, but that the record was the best evidence; and further, that such testimony from this witness was contradictory of Exhibit 2. Testimony, however, was admitted, defendant duly excepting.

44. Plaintiff introduced evidence to prove that the abutting owners on West Chapel street were assessed at the uniform rate of 60 cents per front foot for such pavement by the bureau of compensation in its report dated March —, 1900, which report was adopted by the court of common council, as set forth in paragraph 10 of the complaint. Defendant objecting, the evidence was offered and admitted as tending to prove the allegations of the complaint, defendant duly excepting.

The defendant made the following claims of law:

45. That by the provisions of its charter and by general law the plaintiff company prior to the passage of the Act approved July 1st, 1895 was subject to the legal obligation to repave the space
240 between its tracks and two feet each side thereof, or nine feet in width, for each line of track, when ordered so to do by the city.

46. That the Act of 1895 was a continuation of the obligation to repair and repave already existing, providing only a new method for its enforcement; and that even if it was not such a continuation, it was in itself constitutional and valid.

47. That the direction of the Act of 1895 for assessment against the plaintiff company of the cost of laying said pavement was not repealed by the Act approved April 28th, 1899.

48. That if the direction contained in the act of 1895 and the proceedings thereunder, as such proceedings are hereinbefore set forth, be construed as an assessment of benefits, it was in all respects valid: that so considered, the Act of 1895 was in all respects valid and constitutional: that the assessment laid, as set forth, was not the taking of property without compensation, or without due process of law.

49. That the assessment laid by the court of common council, as set forth in paragraph 10 of the complaint, was in all respects regular and binding upon the plaintiff company.

50. That if the assessment directed by the Act of 1895 be regarded as an assessment of benefits, it is an assessment against the franchise of the company, and not against its property.

51. That if the assessment directed by the Act of 1895 be regarded as an exercise of the police power, it was, as carried out in the proceedings herein set forth, in all respects valid.

52. That the liability of the plaintiff to reimburse the city for the cost of the pavement laid in West Chapel street, as directed by the Act of 1895, could not be legally, and was not in fact, extinguished by the Act of 1899, or otherwise.

53. That the assessment was not invalid by reason of the inclusion of any one or more of the items named in Exhibit 6, and that if any of said items were wrongfully included, the assessment might be corrected accordingly.

54. That the assessment was not invalid by reason of the inclusion therein of the cost of maintaining said pavement in repair

for ten years, as stated in the contract, Exhibit F, but that if such inclusion was wrongful the assessment could be modified accordingly.

55. That the plaintiff company was in fact benefited to the extent of the assessment laid.

241 56. That the plaintiff company was at least benefited in the sum necessary to relay the street after the same had been disturbed by the plaintiff company having double tracks between Howe and York streets, and by the company taking up its old rails and putting new rails in the place thereof on other portions of the line.

57. That upon the facts found the Court might and should in the exercise of its equitable power confirm the assessment as laid by the court of common council.

The Court ruled as claimed in paragraph 45, and overruled the claims made in paragraphs 46, 47, 48, 49, 52, 55, and 57, and made no ruling upon the other claims of the defendant.

SHUMWAY, *J.*

[Indorsement:] New Haven County, Superior Court. Filed May 31, 1902. Fowler, Ass't Clerk.

Exhibit F.

Contract Between the City of New Haven and the Boston Asphalt Company, for Paving Chapel Street, Between York Street and Boulevard.

Board of Public Works of the City of New Haven, 1896.

Notice to Contractors.

Paving.

Sealed proposals for paving Chapel street, from York street to the Boulevard, will be received at the office of the Board of Public Works of the City of New Haven, room No. 17, City Hall, until 7:30 o'clock P. M. of the 13th day of May, A. D. 1896, at which hour the bids will be publicly opened and read.

Bidders are required to state in their proposals their names and places of residence; also, that their proposals are made without any connection with any other person or persons making any proposal for the above work: that they are in all respects fair, and without collusion or fraud; and that no person or persons acting in

242 any official capacity whatever for the Board of Public Works of the City of New Haven is directly or indirectly interested therein, or in any portion of the profits thereof.

Each proposal shall be signed by the bidder, and accompanied by a bond of $5,000, conditioned for the execution of the contract within the time specified in this notice, in case the bid be accepted. The sureties of the bond, both for the proposal and the contract, must be satisfactory to the board of public works. No

bid will be considered which has not responsible sureties upon its accompanying bond.

A certified check for $5,000, payable to the order of the city of New Haven, and deposited with the clerk of the board of public works, will be accepted in place of the sureties bond, if the certificate and bond for that case are properly filled out. Blank forms for the purpose will be furnished on application to the said clerk.

The person or persons to whom the contract may be awarded will be required to attend at this office with the sureties offered by him or them, and execute the contract within five days from the date of the award; and in case of failure or neglect so to do he or they will be considered to have abandoned it, and as in default to the city of New Haven.

The right to decline any or all the proposals is reserved, if deemed for the interest of the city.

The engineer's estimate of work and materials is as follows, viz: 23,000 square yards.

These quantities are to be considered as only approximate. The board expressly reserves the right of increasing or diminishing the same, as may be deemed necessary by the engineer.

The proposal must be made upon blanks furnished by the board, and all proposals will be considered as informal which are not in all respects in conformity with this notice.

The form of agreement, including the specification, and showing the mode of payment for the work, is annexed.

Office of the Board of Public Works,
No. 17 City Hall, New Haven, Conn.,
May —, A. D. 1896.

——— ———.

President Board of Public Works, City Engineer.

243 *Contract and Specifications for Paving Chapel Street, from York Street to the Boulevard.*

This agreement, made and concluded this third day of June, in the year one thousand eight hundred and ninety-six, by and between the city of New Haven, by the board of public works of said city, of the first part, and Boston Asphalt Co., Contractor, of the second part.

(*a.*) Witnesseth, that the said party of the second part has agreed and by these presents do agree with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond hereunto annexed, to furnish at its own proper cost and expense all the necessary materials and labor, and to excavate for, regulate, and pave that portion of Chapel street, from York street to the Boulevard, in a good, firm, and substantial manner, and in every way complete the same to the dimensions, in the manner, and under the conditions, and perform all the labor hereinafter specified; and has further agreed that the said board of public works shall be and they are hereby authorized

to appoint such person or persons as they may deem proper to inspect the materials to be furnished, and the work done under this agreement, and to see that the same correspond with the specifications hereinafter set forth, to wit:

Specifications.

(1.) All paving blocks, and crossing gutter, cobble, and curb stones necessary to be removed shall be taken up and immediately removed from the line of work, and delivered to the city supply yard on Commerce street, between Temple and Factory streets, or such other place as may be designated by the superintendent of streets, provided the average haul does not exceed in feet the above location.

(2.) All the small stones and fine material of the Telford paved or McAdam top dressed streets not needed for filling on the street, and deemed suitable by the engineer for top dressing other streets, shall be delivered to streets in the vicinity, or such other points as may be designated by the engineer, provided the average haul does not exceed 5,000 feet.

(3.) All the larger stones not suitable for top dressing other
244 streets shall be delivered to a portable crusher on the line of the work, or such other points as may be designated by the engineer, provided the average haul does not exceed 500 feet.

(4.) All earth and other material necessary to be removed shall be delivered to the Boulevard, between Oak street and Derby avenue, or such other points as may be designated by the engineer, providing the average haul does not exceed in feet the above location.

(5.) The entire width of the roadway between curb lines shall be excavated to the proper depth below the established grade, and in the case of Telford paved roads the entire pavement shall be removed. Should there in the opinion of the city engineer be any spongy material or vegetable matter in the bed thus prepared, all such material shall be removed, and the space filled with clean gravel or sand, carefully rammed, so as to make such filling compact and solid, and the entire roadbed shall be thoroug-ly rolled with a heavy steam roller.

Should any filling be necessary to lay the pavement at the required grade, the contractor shall supply the same without extra compensation therefor. Said finding shall be composed of good, wholesome earth, free from ashes, garbage, or other foreign matter, and be placed upon the roadbed, and thoroughly rammed or rolled, as the engineer may direct, and in layers not more than six inches in depth. The contractor will be permitted to use the fine stone from the surface of the Telford pavement for such filling. Upon the bed thus prepared and shaped to correspond to the required crown of the street shall be laid a bed of concrete, six inches in depth. If the large foundation stone of Telford paved roads are retained upon a street, the street shall be excavated to the proper depth, and the large stone replaced, together with a sufficient quantity of small stone and fine material to make a close, compact mass;

and the whole shall then be thoroughly rolled with a steam roller, and the surface made parallel with proposed surface of the finished pavement; and upon this bed shall be placed the concrete bed, six inches in depth.

The bed shall be truly shaped, trimmed, and completed for at least fifty (50) feet in advance of the laying or placing of any concrete thereon, until the ends of the block are reached.

(6.) The curb stones shall be reset wherever necessary, and new curb stones shall be furnished by the city, and set by the contractor, whenever required by the city engineer.

245 (7.) The price allowed the contractor for setting or resetting all curb stones shall be the sum of five (5) cents per lineal foot.

(8.) The city will furnish all the broken stone required for making the concrete foundation, delivered on the line of the work. The concrete shall be composed of one part Rosendale hydraulic cement, two parts of clean, sharp sand, and four parts of broken stone, by measure. The cement and sand shall be mixed dry, and then the stone, after being slightly dampened, shall be added and thoroughly mixed, and then the whole mass shall be sprinkled while being turned by men with shovels. The operation shall be continued until the entire mass has been completely turned over not less than three times, and until all the broken stone are thoroughly incorporated in the mortar. Care shall be taken not to get the mixture too wet.

If the concrete is mixed by machinery, the method shall be subject to the approval of the engineer.

The broken stone shall be of a size not larger in dimension than will pass through a two and one-half inch ring, and will be crushed and screened before being brought upon the work.

(9.) The cement for making the concrete shall withstand the following tests, viz:

1st. It shall be ground so finely that ninety per cent. shall pass through a sieve of twenty-five hundred meshes to the square inch.

2d. Briquets, moulded from a paste composed of seventy-five per cent. of cement and twenty-five per cent. of water, shall have a tensile strength per square inch of forty pounds, after one hour in air and twenty-four hours' immersion in water, and one hundred and twenty-five pounds, after seven days in air.

(10.) The whole operation of mixing and laying each batch must be performed as expeditiously as possible by the employment of a sufficient number of skilled men, and if necessary the concrete must be protected from the action of the sun and wind until set.

The concrete shall be placed in proper position, and then rammed with wooden rammers until it is thoroughly compacted, and shows a clear mortar surface. No carting or wheeling will be allowed on the concrete until it is sufficiently set, and then only on planks laid down for the purpose.

The upper surface shall be made exactly parallel with the
246 surface of the finished pavement to be laid. Suitable screeds of scantling shall be used in laying the concrete, to insure the proper grade of the surface.

(11.) Upon this concrete base as soon as sufficiently dry shall be laid on the asphalt pavement.

The asphalt wearing surface shall be not less than two (2) inches in thickness after the final rolling.

(12.) If there be a railroad track or tracks in the street, the edges of the asphalt paving adjacent to the rails shall be carefully worked under the top flange.

(13.) If rock asphalt is used, it shall be a mixture of from three to four parts of the natural bituminous limestone rock from the Sicilian mines at Ragusa and one part from the German mines at Vorwohle, equal in quality and in the proportion of its composition to that mined by The United Limmer and Vorwohle Rock Asphalt Company, Limited. Sworn certificates, or other sufficient evidence that the material is a product of the first quality from the mines designated, must be furnished.

The lumps of rock after being mixed in the proper proportions shall be finely crushed and pulverized, and the powder shall then be passed through a fine sieve. Nothing whatever shall be added to or taken from the powder obtained by grinding the bituminous rocks.

This powder shall be heated in a suitable apparatus to about 160 degrees Fahrenheit, and brought to the ground at such temperature in carts made for the purpose, and then carefully spread on the concrete foundation previously prepared for it to such depth that after having received its final rolling it will have a thickness of two (2) inches.

It shall be skillfully compressed by heated hammers and rolled by heated rollers until it shall have the required thickness of two (2) inches. The surface shall then be rendered perfectly even by heated smoothers, and then finally rolled with a steam roller weighing not less than 250 pounds per lineal inch, the rolling to continue as long as an impression is made upon the surface, and for not less than five hours for each 1,000 yards rolled.

(15.) All materials to be provided by the contractor shall be of the best description; and he shall furnish all efficient labor and implements necessary for the full and complete performance of his contract. If any materials or implements should be brought
247 to the ground which the engineer or inspector may deem to be of improper description, or improper to be used in the work, the same shall be removed by the contractor as soon as practicable.

(16.) The prosecution of the various parts and classes of the work embraced in this contract shall be carried on in such order, at such points, and in such manner as shall be directed by the engineer.

(17.) The contractor shall have charge of and be responsible for the entire line of work until its completion and acceptance; and any unfaithful or imperfect work that may be discovered at any time before the final completion and acceptance of the work embraced in this agreement shall be corrected immediately on the requirement of the engineer.

(18.) The contractor will be required to observe all the ordi-

nances of the city in relation to obstructing the streets, keeping open passageways, and protecting the same where they are exposed and would be dangerous to the public travel; and he will be held responsible for all damages the city may have to pay in consequence of his failure to protect the public from injury.

(19.) Whenever necessary the contractor shall be allowed to close to public travel any portion of the said Chapel street under permission and directions, to be given in writing by the city engineer.

(20.) The contractor shall be liable for keeping in repair and good order the whole of the work executed by him for ten (10) years after the date of the final estimate.

(21.) The work shall be carried on in such portions as the engineer shall direct; and he shall have the power, also, with the consent of the board, to vary, extend, or diminish the quantity of work during its progress, without vitiating the contract; but no part of the work shall be altered by the contractor from that shown on the drawings, or described in the specifications, without express sanction of the city engineer in writing.

(22.) If any person employed on the work by the contractor shall appear to the engineer to be incompetent or disorderly he shall be discharged immediately on the requisition of the board; and such person shall not again be employed.

(23.) The contractor will be required to execute the work in such a manner as to interrupt as little as possible the public use of the street. He will be held responsible for all practicable and
248 legal notice and signals to the public of the street while the work is in progress. He shall keep a bright red light burning during the entire night at both ends of the work, and at such other points as may be necessary. He shall also provide watchmen, fences, and take such other precautions as may be necessary to protect life and property.

(24.) In case of any dispute as to the meaning of this specification, the decision of the city engineer given in writing shall be final and conclusive.

(25.) Any work not herein specified which may be fairly implied as included in this contract, of which the city engineer shall judge, shall be done by the contractor without extra charge.

(26.) Whenever the word "board" is used in this specification it refers to the Board of Public Works of the City of New Haven, the parties of the first part of this agreement.

(27.) Whenever the word "engineer" is used in this specification is refers to the engineer of the board of public works, or their authorized agents or inspectors; and all explanations or directions necessary to completing satisfactorily the different descriptions of work contemplated and provided for under the contract will be given by said engineer.

(28.) Whenever the word "contractor" is used in this specification it refers to the party or parties of the second part to the agreement for the construction of the work herein specified.

(c.) The said party of the second part hereby further agrees that the said parties of the first part shall be and they are hereby author-

ized to retain out of the moneys payable to the said party of the second part under this agreement the sum of fifteen per cent., on the amount of the contract for the purpose hereinafter specified, and to expend the same in the manner hereinafter provided for, in making such repairs on the line of said pavement as the board of public works may deem necessary.

And it is further agreed that if at any time during a period of one month from the date of the final estimate on the pavement aforesaid any part of the work embraced in this agreement shall in the opinion of the said board require repairing, and the said board shall notify said party of the second part to make the repairs so required, and if the said party of the second part shall neglect to make such
249 repairs to the satisfaction of said board within three days from the date of the service of such notice, that then the said board shall have the right to employ such other person or persons as they may deem proper to make the same, and to pay the expense thereof out of the sum retained for that purpose by the said parties of the first part, as before mentioned.

And the said parties of the first part hereby agree upon the expiration of the period of one month, provided that the said pavement shall at that time be in good order, that the said party of the second part shall be entitled to receive the whole, or such part of the sum last aforesaid as may remain after the expense of making the said repairs in the manner aforesaid shall have been paid therefrom.

And said party of the second part hereby further agrees that it will maintain said pavement in good condition for the period of ten years from the date of the final estimate; and that if at any time during the said period of ten years any portion of said work, because of any depressions, bunches, or cracks, broken or worn brick, shall in the opinion of the board of public works require repairs, then said board shall notify said party of the second part by a written notice left with the contractor personally, or at his usual place of abode, or with his agent in charge of the work; and if said party of the second part shall not within five days from the date of service of said notice commence and proceed with said repairs to the satisfaction of the board of public works, then said board shall notify the sureties, and in case of a like failure on their part to proceed within five days of the date of service of said notice to make repairs in a satisfactory manner, then said board of public works shall have the right to purchase such materials as they may deem necessary, and to employ such persons as they may deem proper, and to make said repairs at the expense of said party of the second part, or its sureties. And it is further agreed that at the expiration of the said period of ten years the work shall be inspected, and all imperfections, depressions, and unevenness of surface, cracks, rolls, or breaking of wearing or cushion coat or concrete base must be corrected, and the pavement put in good condition, upon which the board will accept the same; and until such acceptance the guaranty shall be in force.

The said party of the second part further agrees that dur-
250 ing said period of ten years it will lay and restore the pavement over the trenches made for laying water and gas pipes,

sewers, and other purposes permitted by the board of public works, at ten per cent. advance over the contract price, and when once so laid and restored maintain the same in the same state of repair as agreed to for the other parts of the pavement: it further agrees not to demand additional or further payment on account of injury or sinking of the pavement so laid and restored.

(*d.*) The said party of the second part hereby covenants and agrees that it will not sell or permit to be removed from the line of the work any building sand, earth, or other material, nor use the filling for any other purpose that that herein before specified, except upon a written order, signed by the city engineer.

(*e.*) The said party of the second part further agrees that the return of the city engineer shall be the account by which the amount of materials furnished and work done in terms of this contract shall be computed; and that it shall not be entitled to demand or receive payment for any work upon, in or about the said work as extra work, unless ordered in writing by the city engineer to do the same as extra work, and a price therefor agreed upon previously to its commencement.

(*f.*) The said party of the second part hereby further agrees that it will commence the aforesaid work within five days after notice in writing shall be given to commence, and progress therewith so as to complete the same in accordance with this agreement on or before the expiration of the seventieth day after the date of said notice.

(*g.*) The said party of the second part further agrees that if at any time the engineer shall be of opinion that the said work is unnecessarily delayed, and will not be finished in the prescribed time, he shall notify the contractor in writing to that effect. If the contractor should not within five days thereafter take such measures as will in the judgment of the engineer insure the satisfactory completion of the work, the engineer may then by and with the consent of the board notify the aforesaid contractor to discontinue all work under the contract; and it is hereby agreed that the contractor shall immediately respect said notice, and stop work, and cease to have any rights to possession of the ground. The engineer shall thereupon have the power under the direction of the board to place such and so many persons as he may
251 deem advisable, by contract or otherwise, to work at and to complete the work herein described, and to use such materials as he may find upon the line of said work, or to procure other materials for the completion of the same, and to charge the expense of said labor and materials to the aforesaid contractor, and the expense so charged shall be deducted and paid by the parties of the first part out of such moneys as may be then due, or may at any time thereafter grow due to the said contractor under and by virtue of this agreement, or any part thereof; and in case such expense is less than the sum which would have been payable under this contract if the same had been completed by the party of the second part, it shall be entitled to receive the difference; and in case the expense is greater, the party of the second part shall pay the amount of such excess so due.

(*h.*) The said party of the second part hereby further agrees that the said party of the first part shall be and they are hereby authorized to deduct and retain out of the moneys which may be due or become due to the said party of the second part under this agreement the sum of five dollars per day as fixed and liquidated damages for each and every day the aforesaid work may be incomplete over and beyond the time allowed for its completion.

And the said parties of the first part hereby agree that in case the party of the second part shall suffer damage from loss of time where the same is caused by or under the direction of the said parties of the first part, and said party of the second part shall be entitled to such reasonable extension of time for the completion of the aforesaid work as may be decided upon by the city engineer; *provided, however,* that no claim shall be made unless within three days after such loss or damage notice in writing shall be given to the city engineer of the said loss or damage, and the amount claimed.

(*i.*) The said party of the second part hereby further agrees to erect and keep erect- a fence or railing across the ends and sides of the excavation, and place sufficient red lights on or near the work, and keep them burning from twilight in the evening until sunrise, and also to employ a watchman as an additional security whenever the same may be needed.

(*j.*) The said party of the second part further agrees to give notice at least twenty-four hours before breaking ground to all persons, inspectors, superintendents, or otherwise, in charge 252 of property, gas pipes, water pipes, rail tracks, or otherwise, that may be affected by its operations. And it is further agreed that the said party of the second part shall not cause any hindrance to or interfere with any such persons, company, or companies, in protecting, removing, or altering their said work, where rendered necessary by any of the aforesaid work; but that the said party of the second part will suffer the said company or companies to take all such measures as they may deem necessary for the purpose aforesaid.

(*k.*) It is hereby further agreed that in case any damage or injury shall or may result to the said water pipes, gas pipes, lamp posts, lamps, rail tracks, and other works of any person, company, or companies, through or by reason of any negligence, carelessness, or want of skill on part of said party of second part, the said party of second part shall become liable to pay such amount as shall or may be sufficient to cover the expense and damage occasioned by such negligence, carelessness, or unskillfulness; and such amount shall be charged against the said party of the second part, and may be deducted from any sum or sums due or payable to the said party of the second part on account of this contract, and paid by the parties of the first part to the party or parties entitled thereto.

(*l.*) The said party of the second part further agrees that it will execute a bond in such sum and with such securities as shall be approved by the board of public works for the faithful performance of this contract, conditioned to indemnify and save harmless the parties of the first part from all suits or actions of any name and description brought against them, or the city of New Haven, for

or on account of any injuries or damages received or sustained by any party or parties by or from the said party of the second part, its servants or agents, in the construction of said work, or by or in consequence of any negligence in guarding the same, or any improper materials used in its construction, or by or on account of any act or omission of the said party of the second part, or its agents, or on account of any claim or claims of any person or persons claiming to be patentees of any process connected with the work herein agreed to be performed, or of any material or materials used upon said work, and for the faithful performance of this contract by the party of the second part; and the said party of the second part hereby further agrees that so much of the moneys
253 due to it under and by virtue of this agreement as shall be considered necessary by the said board may be retained by the said parties of the first part until all such suits or claims for damages as aforesaid shall have been settled, and evidence to that effect furnished to the satisfaction of the said board.

(*m.*) The said party of the second part hereby agrees to receive the following price as full compensation for furnishing all materials and labor in building and constructing and in all respects completing the aforesaid work, in a manner and under the condition before specified, to wit: for taking up and removing the paving, crossing, and gutter stones; also, the excavation, whatever the nature of the material; also, the removal and disposal of all rubbish and surplus material of whatever nature; also, furnishing the materials and constructing the pavement, crosswalks, and gutters; also, all loss or damages arising out of the nature of the work aforesaid, or from the action of the elements, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same; also, all expenses incurred by or in consequence of the suspension or discontinuance of said work as before specified, and for well and faithfully completing the same, and the whole thereof, in the manner hereinbefore specified, viz:

For each square yard of surface of roadway paved the sum of three dollars and thirty cents ($3.30).

(*n.*) And the said party of the second part further agrees that it will not assign, transfer, or sublet the aforesaid work, or any part thereof, without the written consent of the board of public works, and that any assignment, transfer, or subletting without the written consent of the board aforesaid shall in every case be absolutely void.

(*o.*) And the said party of the second part further agrees that it shall not be entitled to demand or receive payment for any portion of the aforesaid work or materials until the same shall be fully completed in the manner set forth in this agreement, and such completion certified by the engineer in charge of the work, and by the inspector appointed to examine the same, and until each and every of the stipulations hereinbefore mentioned are complied with. Whereupon the parties of the first part will pay, and hereby bind themselves and their successors to pay, to the said party
254 of the second part in cash, on the tenth day of the month next succeeding that in which the work is done, eighty-five

per cent. (85 per cent.) of the monthly estimate of the whole amount of money accruing to the said party of the second part under this contract; *provided*, nothing herein contained be construed to affect the right hereby reserved of said board to reject the whole or any portion of the aforesaid work, should the said certificates be found or know to be inconsistent with the terms of this agreement, or otherwise improperly given.

(*p.*) And it is further agreed by the parties of the first part that the remaining fifteen (15) per cent. shall be paid to the said party of the second part at the expiration of one month from the date of the final estimate for the whole work, as provided in section (*c.*) of this agreement.

In witness whereof the parties to these presents have hereunto set their hands and seals, the day and year first above written.

THE CITY OF NEW HAVEN, [L. S.]
By JAMES E. McGANN,
President of the Board of Public Works.
BOSTON ASPHALT CO., [L. S.]
By J. THOS. GORE, *President.*

Signed and sealed in presence of

W. H. MANSFIELD,
Witness for both parties.
L. H. JOHNSON,
Witness for signature of James E. McGann.

Know all men by these presents that we, Boston Asphalt Company, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the City of New Haven in the sum of thirty-eight thousand dollars, lawful money of the United States of America, to be paid to the said city of New Haven, their successors and assigns, for which payment well and truly made we bind ourselves, our successors, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals.

Dated the fourth day of June, in the year one thousand eight hundred and ninety-six:

255 Whereas, the said Boston Asphalt Company has entered into a contract with the city of New Haven, by their board of public works, bearing date the third day of June, eighteen hundred and ninety-six:

Now the condition of this obligation is such, that if the said Boston Asphalt Company shall well and truly keep and perform all the terms and conditions of the said contract on their part to be kept and performed, and shall indemnify and save harmless the said the city of New Haven as therein stipulated, then this obliga-

tion shall be of no effect; otherwise, it shall remain in full force and virtue.

BOSTON ASPHALT CO., [L. S.]
By J. THOS. GORE, *President.*
AMERICAN SURETY CO. OF N. Y. [L. S.]
By EDW. W. HUTCHINS,
Resident Vice Pres.
HENRY B. PEARCE, [L. S.]
Resident Ass't Sec.

Approved:
GEORGE M. GRANT,
JAMES E. McGANN,
JAMES BISHOP,
Contract Committee.

JOHN W. DERRICK,
As to A. S. Co.

Signed and sealed in presence of
W. H. MANSFIELD,
As to Boston Asphalt Co.

EXHIBIT I.

JULY 23, 1898.

To F. H. & W. R. R. Co., 730 Chapel street:

You are hereby notified that the bpreau of compensation will meet at room- 10 and 11 City Hall, on the 29th day of July, A. D. 1898, at 7:30 o'clock P. M. At that time and place will be given to all who desire an opportunity to be heard in relation to the assessment for the construction of a pavement in Chapel street, between York street and the Boulevard. It is requested that all
256 errors in the ownership or measurements of property be reported as early as convenient to the ———, at room 9 City Hall, for correction. The measurement of your property on said street is 9,705 square yards. The rate of assessment per square yard is $3.30. The amount of the proposed assessment for benefits against you is $36,879.

WM. C. DE F. DICKINSON, *Clerk.*

EXHIBIT 2.

SEWERS AND PAVEMENTS,
DEPARTMENT OF PUBLIC WORKS,
BUREAU OF COMPENSATION.

To the Director of Public Works of the City of New Haven:

The bureau of compensation, to whom was referred the cost of a pavement in Chapel setreet, from York street to the Boulevard, for the assessment of benefits and the apportionment of the cost of said pavement among the parties interested therein, respectfully report that they have attended to the duty assigned them.

That they have caused reasonable notice to be given to all persons interested in the said public improvement, in all respects pursuant to the provisions of the charter of said city, to appear before them, and be heard in reference thereto; and they fully heard at the time and place specified in said notice all persons who appeared before them.

They therefore respectfully recommend the adoption of the accompanying order.

All of which is respectfully submitted.

A. M. HILLER,
FRED C. LUM,
CHARLES T. COYLE,
Bureau of Compensation.

CITY OF NEW HAVEN, *August* 1, 1898.

Ordered, that the sum of fifty-nine thousand, one hundred and thirteen and 18/100 dollars be and is hereby assessed upon the owners of property fronting on Chapel street, from York street to Boulevard, being a proportionable and reasonable part of the expense of constructing a pavement in said street.

The names of each party and the amount of assessed benefit against each being herein particularly stated, viz:

[Here follow the names of the owners of 142 pieces of
257 land, and the amounts assessed against each, aggregating $22,234.18, which names and separate amount are omitted from this exhibit by agreement of counsel],..... $22,234.18
F. H. & W. R. R. Co.,..... 36,879.00

$59,113.18

[Indorsement:] Board of Aldermen, Sept. 6th, 1898. Accepted, order passed, and assessments laid as reported.

R. F. LYON,
City Clerk.

EXHIBIT 3.

To the Honorable Court of Common Council of the City of New Haven:

Your committee on streets, to whom were referred reports of the board of compensation *de* assessments for permanent pavements in Orange street, between Crown and Canner streets, in Trumbull, between State and Prospect streets, in Ashmun, between Grove and Gregory streets, and between Henry and Munson streets, in Chapel street, between York street and the Boulevard, and in Wooster street, between Union and East streets, beg leave to report that they have attended to the business assigned, and upon due examination are of the opinion that the reports should be accepted and adopted.

They therefore respectfully recommend that said reports be adopted, and assessments laid as reported.

All of which is respectfully submitted.

JOHN HOGAN, *Chairman.*

Exhibit 4.

To the Honorable Court of Common Council of the City of New Haven:

Your committee on streets, to whom were referred the reports of the board of compensation *de* assessments for permanent pavements on Orange street, Trumbull street, West Chapel street, Ashmun street, and Wooster street, beg leave to report that they have attended to the business assigned, and upon due examination are of the opinion that the said reports should be referred back to the bureau of compensation for a new assessment of benefits and
258 damages in accordance with the provisions of the new street paving law.

They therefore respectfully recommend that they be so referred.

All of which is respectfully submitted.

JOHN BEECHER, *Chairman.*

Exhibit 5.

Resolution Presented by Wm. C. Keane.

Ordered, that the board of compensation be instructed to levy assessments for benefits for permanent pavements on the following named streets: Orange street, West Chapel street, Wooster street, Ashmun street, and Trumbull street, under the provision of the new street paving Act.

Exhibit 6.

Paid for engineering,	$766.25
Inspectors,	862.05
Crossing stone, curb, etc., etc.,	659.12
Relaying crosswalks (blank),	
Sundries,	12.39
Repairing hydrants,	51.31
Paving bulkheads,	127.90
Labor and teams,	4,384.15
Proportional cost of tools,	1,156.00
Crushed stone from Westville,	3,376.80
Total,	$11,395.97
Amount paid contractor,	82,391.52
Total cost,	$93,787.49

New Haven County, Superior Court, June 9, 1902.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY
vs.
CITY OF NEW HAVEN.

Defendant's Appeal.

In the above entitled cause the defendant appeals from the
259 judgment of said Court to the Supreme Court of Errors to be held at Bridgeport, within and for the Third Judicial District, on the fourth Tuesday in October, 1902, for the revision of the errors which the defendant claims to be apparent on the face of the trial record, and to have occurred in the trial thereof; and for reasons of said appeal the defendant assigns the following:

1. The Court erred in overruling, except as to paragraph 14 and 16 of the complaint, the defendant's motion to strike out.

2. The Court erred in overruling the defendant's demurrer.

3. The facts stated in the judgment do not support the judgment rendered, because it is stated in the judgment that the increase in the assessment was made by the common council, without any consideration of, and without reference to, the benefits accruing to the property of the plaintiff by reason of the repaving of said street with asphalt, whereas it is not stated that the actual cost of the pavement included within the plaintiff's tracks and for two feet on either side thereof did not exceed the sum of five thousand, eight hundred and twenty-three dollars ($5,823), the amount assessed by the judgment.

4. The facts stated in the judgment do not support the judgment rendered, because it is stated that the assumed cost of the pavement between the rails of the tracks and for two feet on either side thereof, including the guaranty to keep the same in repair for ten years, was thirty-six thousand, eight hundred and seventy-nine dollars ($36,879), and that said assumed expense included certain items which were improperly charged as a part of said expense, whereas it is not stated that the exact amounts of such erroneous items did not appear, and it is not stated that the actual cost of such pavement, excluding the items referred to, did not exceed the sum of five thousand, eight hundred and twenty-three dollars ($5,823).

5. The facts stated in the judgment do not support the judgment rendered, because it is stated that the asphalt pavement in said street is not a direct benefit to the plaintiff or its property, whereas it is not stated whether or not the plaintiff company was in fact, by the city's construction of said pavement, relieved from performance of the obligation imposed upon the plaintiff company by law to pave any portion of the surface of said street, or to repave the same, when ordered so to do by the city.

260 6. The facts set forth in the finding do not support the conclusions stated in paragraph 36, because it appears by the other paragraphs of the finding, and particularly by paragraphs 7

and 10, that the plaintiff company having for its own purposes taken up its rails and tracks throughout that portion of Chapel street upon which the said pavement was constructed, and having thus disturbed the road and pavement theretofore existing, and being by law obliged to replace at its own expense the roadway and pavement so disturbed, was saved the expense of such replacement by the construction of said pavement by the city, at the sole expense of the city, and it does not appear that the expense of such replacement did not exceed the sum of $5,823.

7. In overruling the defendant's claim of law stated in paragraph 46 of the finding.

8. In overruling the defendant's claim of law stated in paragraph 47 of the finding.

9. In overruling the defendant's claim of law stated in paragraph 48 of the finding.

10. In overruling the defendant's claim of law stated in paragraph 49 of the finding.

11. In overruling the defendant's claim of law stated in paragraph 52 of the finding.

12. In overruling the defendant's claim of law stated in paragraph 55 of the finding.

13. In overruling the defendant's claim of law stated in paragraph 57 of the finding.

14. In not ruling upon defendant's claim of law stated in paragraph 50 of the finding.

15. In not ruling upon defendant's claim of law stated in paragraph 51 of the finding.

16. In not ruling upon defendant's claim of law stated in paragraph 53 of the finding.

17. In not ruling upon defendant's claim of law stated in paragraph 54 of the finding.

18. In not ruling upon defendant's claim of law stated in paragraph 56 of the finding.

19. In admitting the evidence as stated in paragraph 38 of the finding.

20. In admitting the evidence as stated in paragraph 39 of the finding.

261 21. In admitting the evidence as stated in paragraph 40 of the finding.

22. In admitting the testimony of John K. Punderford as stated in paragraph 41 of the finding.

23. In admitting the evidence as stated in paragraph 42 of the finding.

24. In admitting the testimony of witness, Hiller, as stated in paragraph 43 of the finding.

25. In admitting the evidence as stated in paragraph 44 of the finding.

The defendant therefore prays for such relief as is provided by law in the premises.

THE CITY OF NEW HAVEN,
By LEONARD M. DAGGETT,
E. P. ARVINE, *Its Attorneys.*

I certify that the foregoing appeal was filed on the 9th day of June, A. D. 1902; and Leonard M. Daggett, Esq., of New Haven, is recognized in the sum of $70, conditioned that the said city of New Haven shall prosecute said appeal to effect, and pay all costs therein if it shall fail to do so; and said appeal is hereby allowed.

JOHN S. FOWLER,
Assistant Clerk.

New Haven County, Superior Court, 13th Day of June, 1902.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Bill of Exceptions.

1. Upon the trial of the above entitled cause to the Court the Court sustained the defendant's claim of law as the same appears in paragraph 45 of the finding, against the contention of the plaintiff.

2. The plaintiff claimed that the Special Act approved June 1st, 1895 in so far as it related to the assessment of benefits for the paving of West Chapel street was repealed by the Act of 1899, p. 181, and the Court so ruled.

262 3. The plaintiff further claimed that if said Act were not so repealed, it would be in its relation to such assessment unconstitutional and void, as contrary to the provisions of the United States Constitution and its amendments, and in particular the provisions of sec. 1 of amendment XIV of said constitution, in that it would deprive the plaintiff of its property without due process of law, and would deny it the equal protection of the laws.

4. The plaintiff further claimed that said Act of 1895 would be void, as being neither an amendment of plaintiff's charter, nor an Act in the exercise of the police power of the State, and as depriving the plaintiff of its property without just compensation, contrary to the provisions of sec. 11 of Article first of the Constitution of this State.

5. The plaintiff asked the Court to rule that an obligation on the part of the plaintiff to repair the space between the rails and for two feet on either side of the tracks, even if it authorized the city to require the plaintiff to repave, so as to correspond with the pavement on the rest of the street, would not justify the assessment as made by the court of common council.

6. The plaintiff asked the Court to rule that the Act of 1895 would in its relation to this assessment be unconstitutional and void, as purporting to make an assessment arbitrarily, and without any ascertainment of benefits.

7. The plaintiff asked the Court to rule that the Act of 1895 could not be sustained as an amendment to the plaintiff's charter, and that if so construed it would be a law impairing the obligation of the contract between the State of Connecticut and the plaintiff,

and contrary to the provisions of sec. 10 of Article I of the Constitution of the United States.

8. The plaintiff asked the Court to rule that as the assessment appealed from included not only the cost of the pavement but the cost of keeping the same in repair for ten years, and as those items were not separable, the whole assessment was void.

9. The plaintiff claimed that the obligation imposed upon the railroad under the statute of 1895 did not necessarily include the right to require the road to repave the space between the tracks and two feet on each side.

10. The plaintiff claimed that the obligation to repave was a different thing from the obligation to repair, the one being an improvement, and the other merely maintenance.

263 11. The plaintiff claimed that the repavement if required at all could only be required when it was found to be a satisfactory, or the most satisfactory, method of repair, which did not appear in this case.

12. The plaintiff claimed that the assessment of $5,823 was unjust and arbitrary, and made without legal right, because there was no actual, direct benefit to the plaintiff or his property.

13. The plaintiff claimed that the assessment appealed from could not be supported as an assessment upon the franchise of the company.

14. The Court did not rule in accordance with the above named requests of the plaintiff, for the reason that it was of the opinion that the Act of 1895 so far as it affected the pavement in question was repealed by the Act of 1899, and therefore decided against said request.

The plaintiff within five days after the allowance of the defendant's appeal, and before the rising of the Court, files this its bill of exceptions, and prays that the same may be allowed and signed, and be made a part of the record in this cause, to the end that the questions arising herein may be considered by the Supreme Court of Errors in connection with those presented by the appeal, and the opinion of the Court be expressed thereon, in case a new trial is advised, in pursuance of sec. 16 of the Public Acts of 1897.

THE FAIR HAVEN & WESTVILLE
RAILROAD COMPANY,
By TALCOTT H. RUSSELL,
WATROUS & DAY, *Its Attorneys.*

[Indorsement:] New Haven County, Supreme Court. Filed June 13, 1902. Anketell, Clerk.

Being of the opinion that some, at least, of the questions arising upon the above bill of exceptions will arise again, if a new trial of this cause should be had, the above bill of exceptions is hereby allowed, and ordered to be made a part of the record.

June 20th, 1902.

SHUMWAY, *J.*

264 New Haven County, Superior Court, July 31, 1903.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Memorandum.

The case at bar having been once heard in the Superior Court was taken to the Supreme Court, and upon error found by the latter was remanded to the Superior Court, to be proceeded with according to law. Upon agreement of counsel the case, without testimony, has been submitted to this Court by both sides, with statements of the claims of law, some of the facts heretofore brought out, with additional claims, among others, upon the question of interest, and the finding of facts heretofore submitted to the Supreme Court.

It appears to me upon a careful examination of all the papers submitted, the briefs, the claims pro and con, and the opinion of the Supreme Court, that there are insuperable obstacles to the final determination of this issue upon the contradictory views of counsel as to what should and what should not form a basis upon which to arrive at a legal and conscientious conclusion.

The fact is, the litigants are not agreed upon their premises, and their claims as to what should be submitted in certain phases of the case are as wide apart as their views have always been upon the principal issue, to wit, the validity of the assessment.

If I read aright, the Supreme Court has settled that question, and, practically, the constitutional question raised, and has decided that the rule adopted by the Superior Court in determining the validity of the assessment, involving the Acts of 1895 and 1899, was erroneous. It seems to me that the Supreme Court having determined the important legal question raised in favor of the validity or the assessment, simply leaves this Court to decide whether the assessment shall stand as fixed by the city authorities, or whether it shall be modified or reduced in relief of plaintiff. The Court in the opinion says, after disposing of the question of notice, and then referring to the second point raised, "that of the items of expense not involved in the cost of paving the 18 feet of width chargeable to the plaintiff, it is sufficient to observe that while it is quite possibly true that the city may have included improper items of charge, its claim
265 is not tied to the precise amount of its figures, which it will become the duty of the Court below to revise and correct as the facts may require, when it comes to apply the proper rule for determination of the plaintiff's liability."

And as indicated above, the Court says and that which it determines, "the real question between the parties is as to the correctness of the defendant's claim as to the rule to be applied."

To apply the rule certain facts, if not agreed upon, must be submitted in testimony.

Then appears the question of the separation of the cost of repairing from the cost of constructing, the inclusion in the assessment

of the cost of maintenance for ten years, and the addition of certain measurements. Upon these questions, aside from the law involved, the Court must be in possession of the facts upon sworn testimony.

The question of interest may involve a further hearing.

This Court has not the data nor the proper facts upon which to determine these questions to its satisfaction.

I think the case should be committed to the Superior Court for a further hearing upon the points indicated.

It is not necessary, therefore, to determine the question of interest at this time. If this conclusion involves delay, of which in any event there appears considerable ahead, it perhaps is to be regretted; but it is better to be late than wrong. The case is returned for the purpose suggested.

ELMER, *Judge.*

At a Superior Court held at New Haven, in and for New Haven County, on the 25th day of March, A. D. 1904.

Present, Hon Milton A. Shumway, Judge.

New Haven County, Superior Court, March 25th, 1904.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY, a Corporation Located in New Haven,

vs.

THE CITY OF NEW HAVEN, a Municipal Corporation.

Appeal from the Court of Common Council of the City of New Haven.

Judgment.

This application for relief from the action of the court of
266 common council in making an assessment against said plaintiff for the cost of a certain portion of an asphalt pavement in West Chapel street, in said New Haven, came to this Court on the first Tuesday of September, 1900, and thence by continuances to March 30th, 1902, when the parties appeared, and were at issue to the Court on the pleadings, as on file; and the Court having heard the parties found that the assessment should be reduced to the sum of $5,823, and thereupon adjudged that said assessment be so reduced, and be vacated and annulled so far as it exceeded said sum of $5,823, as appears by the files and records of this Court.

And thereupon the defendant appealed from the judgment of this Court to the Supreme Court of Errors, held at Bridgeport, within and for the Third Judicial District, on the fourth Tuesday of October, 1902, as appears by the record of this cause, to which reference is hereby made; and said Supreme Court found error in the judgment of this Court, and rendered judgment remanding the cause to this Court, to be proceeded with according to law; and thence this cause came by regular continuances to the present time, when the parties appeared, and were at issue to the Court on the pleadings, as on file.

And this Court having heard the parties finds the issues for the defendant.

Whereupon it is adjudged and decreed that the application of the plaintiff be dismissed, and that the assessment of $36,879 complained of be confirmed and established, and that the defendant recover of the plaintiff its costs taxed at $—.

SHUMWAY, *J.*

From this judgment the plaintiff appeals to the Supreme Court of Errors, at its next term to be held at New Haven, in and for the Third Judicial District, on the first Tuesday in June, A. D. 1904; and Talcott H. Russell, Esq., of New Haven, is recognized in the sum of $140, conditioned that the plaintiff shall prosecute said appeal to effect, and pay all costs therein if it shall fail so to do.

267 Superior Court, New Haven County, March 28, 1904.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Plaintiff's Notice of Appeal.

Notice is hereby given that the plaintiff appeals from the judgment in said case to the Supreme Court of Errors for the Third Judicial District.

THE FAIR HAVEN & WESTVILLE R. R. CO.,
By TALCOTT H. RUSSELL,
WATROUS & DAY, *Attorneys.*

[Indorsement:] New Haven County, Superior Court. Filed March 28, 1904. Fowler, Ass't Clerk.

Superior Court, New Haven County.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY
vs.
CITY OF NEW HAVEN.

Finding.

1. The plaintiff company was in November, 1897, at the time the pavement hereinafter mentioned was completed, and is now, maintaining and operating a double track road in West Chapel street, in the city of New Haven, westerly from York street to Norton street. The said line is a branch of the general system of the company, and connects with the other tracks of the system at the corner of York and Chapel streets, and extends from the corner of Norton and West Chapel streets through Norton street to Derby avenue, and thence out Derby avenue, over West river, past the property known

as the Yale Field. The length of the line from York street to Norton street is 4,852.5 feet. The road is operated by an overhead trolley.

2. The width of West Chapel street varies from 30 to 35 feet. The trackway is double tracked, and the width of each line
268 of track, including 2 feet on either side thereof, is 9 feet, making the width of the total line of track, with 2 feet on the outer side of the outer rails, 18 feet in all.

3. By an order approved by the Mayor of the City of New Haven on October 1st, 1895 it was duly ordered by the court of common council that the board of public works cause West Chapel street between York and Nott streets to be paved its full width with sheet asphalt, equal in quality with the best pitch lake asphalt. The street referred to in said order as Nott street, otherwise known as the Boulevard, intersects West Chapel street some little distance, namely, about two city squares, beyond and westerly of Norton street.

4. For the purpose of paying for such pavement and other similar pavements constructed at about the same time an issue of bonds was duly made by the city, as authorized by the Special Act approved July 1st, 1895, and the expense of the pavement in West Chapel street was paid from the proceeds of said bonds.

5. On June 4th, 1896 a contract was made between the city and The Boston Asphalt Company for the construction of said pavement in West Chapel street, a copy of which contract is hereto annexed, marked Exhibit F. [See p. 40 of this record.]

6. The actual construction of said pavement was begun in June, 1897, and the same was completed in October or November, 1897.

7. At the time when said pavement was ordered, on October 1st, 1895, the line of the plaintiff company was single track from York street to Norton street, with long turn-outs or switches, which had been constructed by the consent of the city. While said pavement was being constructed, and in anticipation of its completion, the plaintiff company by consent of the city took up its single track between Howe and York streets, and put down a line of double track. Between Park and York streets such double tracking was constructed at the same time the pavement was being laid between the same streets. Between Park and Howe streets such double track was constructed not more than two or three weeks before the pavement between said streets. During the construction of the pavement, and in anticipation of its completion, the plaintiff company for a large part of the distance covered by its double turn-outs took up the old rails, and relaid the track with a new and better rail.

269 8. By the contract the price per square yard of such pavement, namely, $3.30, included both the cost of original construction and the cost of maintaining in repair for a period specified in said contract, and the cost of construction and repair was not in said contract separated, but a definite portion of such price, namely, 37 cents per square yard, was the amount figured by The Boston Asphalt Company as the cost of maintaining said pavement in repair, as required by the terms of the contract.

9. Before the construction of said pavement, and before the enactment of the Special Act approved March 24th, 1897, a pro-

posed amendment of the contract was submitted to the court of common council, with the assent of The Boston Asphalt Company, by which amendment it was proposed to add in paragraph (*m.*) of the contract after the word, "namely" the following words, to wit: "for the original construction of each square yard of surface of roadway paved, the sum of $2.93; and for the cost of keeping said pavement in repair for the term of ten years, the sum of 37 cents per square yard."

10. The pavement throughout the whole width and length of the street so paved was wholly constructed by The Boston Asphalt Company and by the city, and no part of the work of construction was performed by or at the expense of the plaintiff company.

11. After the completion of said pavement the fact of its completion and the expense thereof were duly reported by the director of public works, and on or about February 7th, 1898 an order was made by the court of common council directing an assessment for the said pavement and certain others constructed at about the same time. Said order was transmitted to the bureau of compensation by the director of public works on February 14th, 1898.

12. On July 26th, 1898 the bureau of compensation held a session for the purpose of hearing those persons who might present themselves to be heard in relation to assessment of benefits for the construction of said pavement, at which many owners of property on West Chapel street appeared, and objected to the laying of assessments in accordance with the terms of the Act approved July 1st, 1895.

13. On July 23d, 1898, notice was served upon the plaintiff company that the bureau of compensation would meet on July
270 29th, 1898, and give persons interested an opportunity to be heard concerning assessments for such pavement, a copy of which notice, giving the amount of the proposed assessment, $36,879, is hereto annexed, market Exhibit 1. [See p. 54 of this record.]

14. On July 29th, 1898, in accordance with said notice the bureau of compensation met, but no one appeared at said hearing, or at the hearing of July 26th, representing the plaintiff company.

15. The bureau of compensation inquired of the corporation counsel as to the rule which they should adopt in making the assessment, and whether they could make any exception based upon the degree of benefit received, and were advised by him that the Special Act of 1895 was mandatory, that the bureau had no discretion, and that they must take the figures of cost, and assess them arbitrarily to the persons and corporations named in the Act, in accordance with the frontage or dimensions, by the rule fixed by said Act of 1895, which is the Act found printed in the Special Acts, Vol. XII, page 565. And thereupon said bureau of compensation proceeded to make assessments in accordance with said rule. Many persons appeared and objected to the assessment in accordance with said rule; but said bureau of compensation announced that it was governed absolutely by said statute, and would hear no evidence in regard to benefits or damages, and proceeded without reference to or considering benefits or damages.

16. On August 1st, 1898 the bureau of compensation duly rendered a report of its assessments for said pavement, a copy of which said report is hereto annexed, marked Exhibit 2. [See p. 55 of this record.]

17. On or about August 8th, 1898 the board of alderman and councilmen referred said report to the bureau of compensation, Exhibit 2, to the joint standing committee of the common council known as the committee on streets.

18. On August 18th, 1898 said committee on streets held a public hearing upon said report, and other matters pending before said committee, notice of which hearing was duly given by public advertisement in the newspapers, stating the matters which would be heard and considered at said hearing.

19. Thereafter said committee on streets voted to recommend the adoption of said report of the bureau of compensation,
271 and on or about September 6th made report to the common council, a copy of which report is hereto annexed, marked Exhibit 3. [See p. 56 of this record.]

20. The report of the committee on streets, Exhibit 3, including as a part thereof the report of the bureau of compensation, Exhibit 2, was from September 6th, 1898, the date of its submission to the common council, to December 12th, 1898 the subject of disagreement and nonconcurrent action of the boards of aldermen and councilmen, and on December 12th, 1898 by concurrent vote of said boards was referred to a special joint committee.

21. Said report, Exhibit 3, including therewith report of the bureau of compensation, Exhibit 2, remained pending before said special committee and said boards until after the enactment of the Special Act approved April 28th, 1899, namely, until June 12th, 1899, when by concurrent action of the boards of aldermen and councilmen said report was referred to the joint standing committee of the common council known as the committee on streets.

22. Said committee on streets held a public hearing on August 4th, 1899 concerning said matters referred to them, notice of which hearing was duly given by public advertisement in the newspapers, stating the matters to be heard and considered at said meeting.

23. Said committee thereafter voted to recommend that the report assessing benefits and damages for said pavement be sent back to the bureau of compensation for a new assessment, and duly made their report to the common council on or about September 15th, 1899, a copy of which report is hereto annexed, marked Exhibit 4. [See p. 56 of this record.]

24. By concurrent vote of the boards of aldermen and councilmen on September 11th, 1899 said report, Exhibit 4, was accepted, and the recommendations thereof adopted.

25. On September 15th, 1899 said report of the committee on streets, Exhibit 4, together with the report of the bureau of compensation, Exhibit 2, was received by the bureau of compensation.

26. On September 15th, 1899 there was also received by the bureau of compensation a resolution which had been presented to the common council, and had been by concurrent action
272 of the boards of aldermen and councilmen referred on September 5th, 1899 to the bureau of compensation, a copy

of which resolution is hereto annexed, marked Exhibit 5. [See p. 57 of this record.]

27. On February 20th, 1900 the bureau of compensation duly held a public hearing concerning the assessments for said pavement and other similar pavements, at which hearing a representative of the plaintiff company appeared, and objected to any assessment against the plaintiff company, claiming that said pavement was a detriment to the business of the railroad company.

28. Said bureau of compensation on March 2d, 1900 duly rendered its report, making assessments for said pavement, which report is made a part of the complaint in this action, and marked herein Exhibit B, by which report the plaintiff company was assessed $5,823 of the cost of said pavement.

29. Said report of the bureau of compensation was transmitted in due course to the common council, and came before that body in April, 1900; and thereupon the following motion was passed: "Report amended by striking out of order as reported by the bureau of compensation of the amount specified, namely, $11,581.13, and inserting in lieu thereof the amount of $42,537.13, and by further amending said report by striking out the amount of assessment assessed against The Fair Haven and Westville R. R. Company in said report, namely, $5,823, and by substituting in lieu thereof the amount $36,879, and the report as so amended accepted, orders passed, and assessment laid, as per said report."

30. The total cost of said pavement as reported by the director of public works was $93,787.49. This included $82,391.52 paid to The Boston Asphalt Company under the terms of its contract hereinbefore set forth, and also certain other items, being the cost of work done by the city in connection with the construction, all of which items are set forth in a schedule, a copy of which is hereto annexed, marked Exhibit 6. [See p. 57 of this record.] In the copy of the schedule, Exhibit 6, are included only such items as relate to the West Chapel street pavement. In said schedule were similar items under each of the headings Orange street, Ashmun street, Wooster street, and Trumbull street. Certain of these items, other than the amount paid the contractor, were obtained by apportioning expense incurred on account of the several pavements named, to each of such pavements proportionally to the number of square yards of pavement laid.

31. The amount assessed against the plaintiff company, $36,879, was obtained by dividing the total cost of the pavement as shown in Exhibit 6 by the number of square yards laid in West Chapel street, to obtain the cost per square yard, which was $3.80, and then calculating the cost at $3.80 per square yard of the pavement in a strip 18 feet in width for the total line of the plaintiff company's track in West Chapel street.

32. The amount assessed upon the plaintiff company by the bureau of compensation in their report, which is annexed to the complaint, and marked Exhibit B, was obtained by assessing the plaintiff company 60 cents per lineal foot for each line of track in said street.

33. At no time prior to the acts of the boards of aldermen and councilmen and of the mayor of said city set forth in paragraph 10 of the complaint in relation to said assessment did the plaintiff have any notice of the purpose or intention of either of said boards or the mayor to change the assessment as made by the bureau of compensation in its report which was by said action amended, and the plaintiff was not in fact heard by either of said boards or by the mayor as to such contemplated change or amendment, and no hearing was had by either of said boards or the mayor as to the amount of benefits to the property of the plaintiff by reason of the construction of said asphalt pavement in said West Chapel street, other than the hearings had before the bureau of compensation and the committee on streets, as hereinbefore set forth. It did not appear in evidence that such increase in the assessment, as set forth in paragraph 10 of the complaint, was made after any consideration of the benefits accruing to the property of the plaintiff by reason of the repaving of said street with asphalt, otherwise than as such consideration appears by the several acts of the boards of aldermen and councilmen and their committees and of the bureau of compensation, as hereinbefore set forth.

34. Before the construction of the pavement in West Chapel street said street had been paved in part with crushed stone and in part with Belgian blocks. The total cost of that portion of the pavement formerly laid between Howe and York street was $7,157.07, of which sum there had been assessed in 1873 against the plain-
274 tiff company $1,089.27, and against property owners other than the plaintiff company, $3,578.34, and the city had been charged with the balance, namely, $2,489.46.

35. The total cost of that portion of the pavement formerly laid between Howe street and Sherman avenue was $18,091.21, of which amount there had been assessed in 1874 against the plaintiff company the sum of $2,755.82, and against property owners other than the plaintiff company, $8,176.61, and the balance had been paid by the city, namely, $7,158.83.

36. A sheet asphalt pavement is not in general well suited for use in a street where there is a street railway. In the case of West Chapel street it was no direct benefit to the plaintiff or its property, but, on the other hand, was a direct damage, inasmuch as it increased the cost of maintaining and operating the railroad in various ways, and in particular, by increasing the expense of keeping the pavement in repair between the rails and two feet on each side, and also increased the expense of repairs to the roadbed, ties, and tracks of the plaintiff. The only benefit to the plaintiff was indirect, and consisted in the tendency of such improvement of a street to increase the population and consequent traffic in that section of the city. No evidence was offered that such benefit exceeds the sum of $5,823.

37. The plaintiff company at all of the times named in this paragraph has not owned or held any property in West Chapel street other than the line and lines of track, as hereinbefore set forth, the wires, poles, and other similar equipment for operating cars thereon by overhead trolley.

In addition to the above, the applicant asked the Court to take judicial notice of section 9 of the applicant's charter, approved June 20, 1860, which reads as follows:

"SEC. 9. The Common Council of the City of New Haven may from time to time establish such regulations in regard to said railway as may be required for the paving, grading, and sewerage, and the laying of gas and water pipes in and along said streets; and said company in constructing said road shall conform to the grades now existing or hereafter established by said common council of the several streets or avenues traversed by said road. Said company shall keep that portion of the streets and avenues over which their road or way shall be laid down, with a space of two feet on
275 each side of their track or way, in good and sufficient repair, without expense to the city or town of New Hvaen, or to the owners of land adjoining said track or way."

Also, of section 1 of the amendment to the company's charter, approved July 9, 1864, which reads as follows:

"SEC. 1. That The Fair Haven & Westville Railroad Company be and hereby is authorized and empowered to lay down its track, with suitable turn-outs, and to run its cars from York street through Chapel street westerly to Norton street, in the city of New Haven: thence through Norton street to Whalley avenue in said city; and also, from Whalley avenue through Howe street to Chapel street: the same to be done subject to all the provisions of the ninth section of the original charter of said company."

Also, to take judicial notice of the fact that the distance from the center line of York street to the center line of Howe street, measured along the center line of West Chapel street, is approximately eleven hundred feet; and that the distance from the center line of Sherman avenue to the center line of Norton street, measured along the center of West Chapel street, is approximately eleven hundred and fifty feet; and asked the Court to make an addition to the finding embodying these facts.

The Court accordingly does hereby adjudge that said facts should be made a part of said finding, in addition to the finding already made; and the Court takes judicial notice of said provisions of the charter referred to, and of all the provisions of the charter of said company, and of all the general and special legislation of the State of Connecticut affecting the applicant; and it is ordered that said special provisions and said facts be made a part of the finding of the Court.

2. The plaintiff made the following claims of law:

The plaintiff claims and asked the Court to rule that the assessment of $36,879 against the plaintiff was void:

1. Because the Act of 1895 was repealed by the Act of 1899, and therefore no assessment under the Act of 1895 could be supported, and it should be annulled, or reduced to $5,823.

2. Because the assessment of $36,789 was made without any inquiry or finding of benefit to the railroad, and because the law under which said assessment was made does not call for any inquiry or finding of benefit, but is wholly arbitrary.

276 3. Because as a matter of fact there was no benefit whatever to the road.

4. Because the indirect benefit, consisting in the tendency of the pavement to increase the population and consequent traffic in that section of the city, is not such a benefit as will sustain an assessment.

5. Because, for the reasons in claims 2, 3, and 4, said assessment is a violation of Article XIV of the Amendments of the Constitution of the United States, as depriving the plaintiff of property without due process of law, and because said assessment and said Act of 1895 deny to the plaintiff the equal protection of the laws.

6. Because said assessment includes the cost of keeping said pavement in repair, and said amount is not separated or separable from the general assessment; and because said cost of repair cannot be made a legal basis of assessment against the railroad, but should be paid from the general taxation.

7. Because plaintiff is assessed and compelled to pay from general taxation its proportion of the expense of the paving of said street, and if subjected to this assessment, is compelled to pay twice for the same thing.

8. Because the plaintiff is bound under its charter and the laws of the State to keep space between the tracks and for two feet on each side in repair, which obligation stands unrepealed, and the plaintiff could not legally be subjected to an assessment for the expense of doing that which it is still bound to do itself.

9. Because it appears from the finding that over the whole of its route on West Chapel street at least one line of track was in use at the time that said street was paved in 1873 or 1874, and said company has been assessed therefor, and because said company cannot again be compelled to pay the cost of paving the space between and for two feet outside of such single line of track, and its obligation thereto is to keep the same in repair only.

10. Because said assessment should be reduced by the cost of constructing the asphalt pavement, in so far as the same relates to its track as laid prior to the passage of the order for such asphalt pavement, inasmuch as it appears that from Howe street to York street a single line of track was then in use, and a double track for the
277 greater portion of the distance between Howe street and Sherman avenue, and a single track for the remaining distance of its route on Chapel street. Neither the charter, nor the general law, nor any contract between the company and the city or State requires paving or repaving any portion of the street for the paving of which it has been assessed.

11. Because the Act of 1895 so far as it authorizes this assessment against the plaintiff is void, because it impairs the obligation of the contract with the plaintiff contained in its original charter (Private Acts of 1860, page 370), which provides that said company shall keep that portion of the streets and avenues through which their road or way shall be laid down with a space of two feet on each side of their track or way in good and sufficient repair, without expense to the city or town of New Haven, or the owners of land adjoining said

track or way; and said Act is therefore in violation of section 10 of Article I of the Constitution of the United States.

12. Because said Act of 1895 so far as it authorized said assessment against the plaintiff is in violation of the contract contained in the amendment to the charter of the Fair Haven and Westville Railroad Company (Private Acts of 1864, page 655), by which it was authorized and empowered to lay and operate its tracks over the portion of Chapel street affected by said assessment, subject to the provisions of the ninth section of the original charter of said company. Said Act, so far as it authorized said assessment, is in violation of the tenth section of Article I of the Constitution of the United States.

13. Because neither the ninth section of the original charter of the company, nor said amendments, nor the Act of 1895, section 6, requires the plaintiff to pave or repave any portion of the street, and the Act of 1895 cannot be supported as a change in the form of the obligation.

14. Because that portion of section 9 of the charter of the company which reads as follows, "The Common Council of the City of New Haven may from time to time establish such regulations in regard to said railroad as may be required for the paving, grading, sewerage, and the laying of gas and water pipes in and along said streets," does not give the city any power to order pavements, or the payment of the expense of pavement by the road, but means simply that the railroad shall comply with such rules and regulations
278 as will enable the city to complete its operations of paving, grading, sewerage, and the laying of gas and water pipes.

15. Because no general statute or law of this State authorizes any such assessment, or the imposition of any pecuniary burden except when such company has failed, and, after order, refused, to keep such portion of the street in good and sufficient repair.

16. Because said Act of 1895, so far as it affects the railroad, is not a police regulation. It does not on its face bear any evidence of being such, or to have been governed or dictated by considerations appropriate to a police measure, but on the contrary purports to be and is a simple revenue measure.

17. Because there was no necessity for such an Act to enforce any legitimate police regulations. The provisions of the charter of the plaintiff and the Act of 1893 requires the company to repair and keep the road in good condition. Such a charge could not be justified under the police power, even if the Act were so intended, as there was nothing to justify or necessitate such a requirement of the railroad.

18. Because the Special Act approved July 1st, 1895, is not a general law imposing a police regulation to protect the public health, morals, or safety, nor is it a condition lawfully imposed upon the exercises of the franchise conferred upon the applicant, but impairs the obligation of the contract between the State of Connecticut and the applicant, as contained in applicant's charter and amendments, and is therefore unconstitutional, and in violation of section 10 of Article I of the Constitution of the United States.

19. Because the Special Act approved July 1st, 1895 is not a valid

exercise of the police power reserved to the State of Connecticut, in that it arbitrarily imposes a pecuniary burden upon the applicant, and is not passed to protect the health, morals, or safety of the community, and said Special Act is therefore unconstitutional and void, in that it deprives the applicant of its property without due process of law, and denies it the equal protection of the laws, contrary to the provisions of Amendment XIV of the Constitution of the United States, and deprives the plaintiff of its property without compensation, contrary to the provision of section 11 of Article I of the Constitution of the State of Connecticut.

20. Because the assessment appealed from purports to be
279 and, if of any effect, is an assessment for special benefits to the property of the applicant, but if not, it constitutes a statutory obligation to pay money, which cannot be sustained without proof that a payment of this character was under the circumstances necessary to protect the public against an unsafe condition of West Chapel street, caused by the presence of applicant's tracks, or the operation of its railroad, the burden of proof being on the city.

21. Because an order to a street railway corporation to pay the cost of a pavement, which is a direct damage to the corporation, cannot be sustained without proof that the tracks of said company constitute a nuisance in the highway, and that such an order was reasonably necessary, in order to compel the company to respond to its charter and statutory obligation to keep eighteen feet of West Chapel street in repair.

22. Because an Act or Resolution requiring any individual or corporation to pay a portion of the expense of any public work, or a portion of the expenses required to carry on the government of a municipality, or of discharging its ordinary police duties, besides what it is compelled to pay by the general tax laws, cannot be sustained, unless it appear that there is a direct and special benefit to said individual or corporation, or unless it appear that said expenditure is necessary in order to obviate some nuisance or inconvenience for which said corporation or individual is responsible. The plaintiff in this case is not so benefited, nor is the expenditure for which it is assessed in any way necessary to the prevention or removal of any nuisance or inconvenience for which the plaintiff is responsible. Said assessment, therefore, and the Act of 1895 so far as it authorized such an assessment, are void and illegal, and take the property of the plaintiff without due process of law, and without compensation, and deny to the plaintiff the equal protection of the law, contrary to the fourteenth Amendment of the Constitution of the Unied States.

23. Because no interest should be allowed, as the obligation of the company, if any, is not based upon an assessment of benefits, but upon a statutory obligation, the amount of which has not hitherto been legally ascertained, and because interest thereon is not legally collectible, even though the assessment appealed from be deemed an assessment of benefits.

24. Because said Act of 1895 so far as it affects the railroad
280 does not purport to be an amendment to the charter of the railroad company, and cannot be supported as such.

25. Because said Act of 1895 if purporting to be an amendment to the charter would not be valid, as it is an attempt to take and to affect the property rights of the plaintiff without due process of law, and as such cannot be justified under the power of amendment.

26. Because the Special Act approved July 1st, 1895, entitled "An Act Authorizing the City of New Haven to Issue Street Pavement Bonds," cannot be deemed to be an amendment of the applicant's charter, for the following reasons:

(*a.*) Because it purports to affect the charter of the city of New Haven only.

(*b.*) The applicant is not named in said Act otherwise than by reference in the phrase "on all streets occupied by the track or tracks of any railway company or companies," etc.

(*c.*) Said act is not a general statute, but a special law.

(*d.*) It is not in name or effect a police regulation for the health or safety of the public.

(*e.*) It is an Act special in its character, and imposing a pecuniary burden upon such of the railways of the State only as are within the city of New Haven.

(*f.*) It does not appear that said so-called amendment was accepted by the stockholders of the applicant within six months after its passage, or that it is otherwise specially provided in said Private Act.

(*g.*) It does not appear that the applicant appeared or was cited to appear before the General Assembly of 1895 with respect to an amendment to its charter, in the manner proposed in said Special Act.

27. Because said Act of 1895 so far as it affects the railroad cannot be supported as a franchise tax. It does not purport to be such, and is not general in its nature, but lays special burdens upon individual corporations.

28. Because said Act of 1895, if construed as a franchise tax, and the assessment thereunder, are void, because they assume to deprive the plaintiff of the benefit of the contract contained in its charter.

29. Because the obligation, if any, imposed upon the applicant under the Special Act approved July 1st, 1895 does not in-
281 clude the right to require the applicant to repave the space between the tracks and two feet on the outer side of the outer rails, when the greater portion of such space was already paved, and the applicant had already been assessed therefor.

30. Because the Act of 1895 so far as it purports to authorize the city to impose upon the railroad the cost of paving the space between the rails and two feet on either side, is for the reason specified in the claims herein above mentioned consecutively from 6 to 29, inclusive, in Violation of Article XIV of the Amendments of the Constitution of the United States, and section 10 of Article I of the constitution, because it impairs the obligation of contracts with the plaintiff, and because it deprives the plaintiff of its property without due process of law, and denies to the plaintiff the equal protection of the laws.

31. Said assessment of $36,789 is void, because it is for the reasons specified in the claims herein above numbered consecutively from 6 to 9, inclusive, in violation of Article XIV of the Amendments to the Constitution of the United States, and section 10 of Article I of said constitution, because it impairs the obligation of contracts with the plaintiff, and because it deprives the plaintiff of its property without due process of law, and deprives the plaintiff of the equal protection of the law.

3-. The defendant made the following claims of law:

1. Defendant denies each claim of law stated by the plaintiff.

2. The constitutionality of the Act approved July 1st, 1895 was in fact fully presented to and considered by the Supreme Court. It is now too late for the plaintiff to present claims of law as to the validity of that Act, and the validity of the assessment as a whole, which claims were or might have been presented to the Supreme Court.

3. The cost of maintaining the pavement for ten years was properly included in the assessment, and chargeable against the plaintiff. If such cost of maintenance was wrongfully included, such exclusion did not render the whole assessment void, but made it necessary for the plaintiff to show to what extent the assessment should be reduced on this account. If the finding does not sufficiently show that such cost was in fact ascertainable, and its amount, the plaintiff, upon whom was the burden, must take the consequences. The defendant claims that in fact such cost appears by the finding to have been ascertained.

282 4. The question whether interest should run on the assessment is not before the Court. The only question is whether the assessment should be confirmed, annulled, or modified. Unless wholly annulled, interest follows as a legal consequence, and incidental to the proceedings by which such assessment may be collected. No allegation is made in the complaint concerning interest: no prayer for relief from the burden of interest is made: no claim has, until after the adoption of this finding of facts, been presented in court by the plaintiff concerning the allowance of interest.

5. If the question of interest should be considered by the Court, judgment should be that the plaintiff pay interest on the assessment at six per cent. per annum from the day on which this application was dated, namely, May 28th, 1900, to the date of final payment.

The Court overruled each and all of said claims of the applicant, and sustained and ruled in favor of each and all of the claims of the defendant, to all which rulings the plaintiff duly excepted.

The Court rendered judgment for the plaintiff, as on file.

SHUMWAY, *J.*

[Indorsement:] New Haven County, Superior Court. Filed May 20, 1904. Gallagher, Ass't Clerk.

Superior Court, New Haven County, May 24, 1904.

THE FAIR HAVEN & WESTVILLE R. R. CO.
vs.
THE CITY OF NEW HAVEN.

Plaintiff's Appeal.

In the above entitled cause the plaintiff appeals from the judgment of said Court to the Supreme Court of Errors, to be held at New Haven, within and for the Third Judicial District, on the first Tuesday in June, A. D. 1904, for the revision of the errors which the plaintiff claims to be apparent on the face of the trial record, and in the finding of the Court; and for reasons of said appeal the plaintiff assigns the following:

283 1. The Court errer in overruling the first of the plaintiff's claims of law, as set forth in the finding.

2. The Court erred in overruling the second of the plaintiff's claims of law, as set forth in the finding.

3. The Court erred in overruling the third of the plaintiff's claims of law, as set forth in the finding.

4. The Court erred in overruling the fourth of the plaintiff's claims of law, as set forth in the finding.

5. The Court erred in overruling the fifth of the plaintiff's claims of law, as set forth in the finding.

6. The Court erred in overruling the sixth of the plaintiff's claims of law, as set forth in the finding.

7. The Court erred in overruling the seventh of the plaintiff's claims of law, as set forth in the finding.

8. The Court erred in overruling the eighth of the plaintiff's claims of law, as set forth in the finding.

9. The Court erred in overruling the ninth of the plaintiff's claims of law, as set forth in the finding.

10. The Court erred in overruling the tenth of the plaintiff's claims of law, as set forth in the finding.

11. The Court erred in overruling the eleventh of the plaintiff's claims of law, as set forth in the finding.

12. The Court erred in overruling the twelfth of the plaintiff's claims of law, as set forth in the finding.

13. The Court erred in overruling the thirteenth of the plaintiff's claims of law, as set forth in the finding.

14. The Court erred in overruling the fourteenth of the plaintiff's claims of law, as set forth in the finding.

15. The Court erred in overruling the fifteenth of the plaintiff's claims of law, as set forth in the finding.

16. The Court erred in overruling the sixteenth of the plaintiff's claims of law, as set forth in the finding.

17. The Court erred in overruling the seventeenth of the plaintiff's claims of law, as set forth in the finding.

18. The Court erred in overruling the eighteenth of the plaintiff's claims of law, as set forth in the finding.

19. The Court erred in overruling the nineteenth of the plaintiff's claims of law, as set forth in the finding.

20. The Court erred in overruling the twentieth of the plaintiff's claims of law, as set forth in the finding.

284 21. The Court erred in overruling the twenty-first of the plaintiff's claims of law, as set forth in the finding.

22. The Court erred in overruling the twenty-second of the plaintiff's claims of law, as set forth in the finding.

23. The Court erred in overruling the twenty-third of the plaintiff's claims of law, as set forth in the finding.

24. The Court erred in overruling the twenty-fourth of the plaintiff's claims of law, as set forth in the finding.

25. The Court erred in overruling the twenty-fifth of the plaintiff's claims of law, as set forth in the finding.

26. The Court erred in overruling the twenty-sixth of the plaintiff's claims of law, as set forth in the finding.

27. The Court erred in overruling the twenty-seventh of the plaintiff's claims of law, as set forth in the finding.

28. The Court erred in overruling the twenty-eighth of the plaintiff's claims of law, as set forth in the finding.

29. The Court erred in overruling the twenty-ninth of the plaintiff's claims of law, as set forth in the finding.

30. The Court erred in overruling the thirtieth of the plaintiff's claims of law, as set forth in the finding.

31. The Court erred in overruling the thirty-first of the plaintiff's claims of law, as set forth in the finding.

32. The Court erred in sustaining the defendant's first claim of law, as set forth in the finding.

33. The Court erred in sustaining the defendant's second claim of law, as set forth in the finding.

34. The Courth erred in sustaining the defendant's third claim of law, as set forth in the finding.

35. The Court erred in sustaining the defendant's fourth claim of law, as set forth in the finding.

36. The Court erred in sustaining the defendant's fifth claim of law, as set forth in the finding.

It therefore prays for such relief as is provided by law in the premises.

THE PLAINTIFF,
THE FAIR HAVEN & WESTVILLE
RAILROAD COMPANY,
By TALCOTT H. RUSSELL,
WATROUS & DAY, *Its Attorneys.*

285 I certify that the foregoing appeal was filed on the 24th day of May, A. D. 1904; and Talcott H. Russell, Esq., of New Haven, is recognized in $140, conditioned that the said Fair Haven & Westville Railroad Company, the appellant, shall prosecute said appeal to effect, and pay all costs therein if it shall fail to do so; and said appeal is hereby allowed.

JOHN CURRIER GALLAGHER,
Assistant Clerk.

New Haven County, Superior Court, Fifth day of October, 1904.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Motion for Leave to File Amendment to Application.

The applicant hereby moves for leave to file an amendment to ne application in the above entitled cause, a copy whereof is hereto ppended.

By TALCOTT H. RUSSELL,
WATROUS & DAY,
Its Attorneys.

New Haven County, Superior Court, Fifth day of October, 1904.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Amendment to Application.

By leave of Court the application is hereby amended by the addition of the following paragraphs:

18. Before the construction of the asphalt pavement in West Chapel street said street had been paved in part with crushed stone, and in part, with Belgian block. The portion between York and Howe streets was laid in 1873, and that between Howe street and Sherman avenue, in 1874. An assessment for benefits to the applicant by reason of the construction of each of said portions was made by the city, and paid by the applicant.

286 19. Said pavement constructed in West Chapel street is of Sicilian rock sheet asphalt, which is not a necessary, suitable, or proper pavement to be required of the applicant in discharge of the obligations of section 9 of its charter, or of section 6 of chapter CLXIX of the Public Acts of 1893.

20. It was not found by the legislature, nor by the common council of the city, nor by the board of compensation, nor any other person or tribunal, that it was necessary, in order to keep the space between the rails and two feet on each side of said railroad track in repair, to pave the same with asphalt.

21. It was not found by the legislature, nor by the common council, nor by any other person or tribunal, that to pave the space between the rails and two feet on either side thereof with asphalt was a necessary or proper means of keeping the said space in proper repair.

22. No hearing or investigation was had by the legislature, nor by said common council, nor by any other person or tribunal, on the question whether the paving of the space between the rails and

two feet on each side thereof was a necessary or proper means of keeping said portion of the road in repair.

23. No order was in fact passed by the city of New Haven and given to the applicant, requiring the applicant to keep the space between its tracks and for two feet on the outer side of each rail in repair by the laying of such asphalt pavement, or of any other pavement, or by keeping up the stone and block pavement then laid in said street.

[Indorsements:] New Haven County, Superior Court. Filed Oct. 5, 1904. Anketell, Clerk.

Upon examination of the record in this case, and the two opinions of the Supreme Court of Errors, I am of the opinion:

1. That at this time the Court has no power to allow the amendment desired.

2. That if it had such power, it ought not and would not in its discretion allow it.

Motion denied.

Oct. 28, 1904. G. W. WHEELER, *J.*

287 New Haven County, Superior Court, November 29, 1904.

FAIR HAVEN & WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Memorandum of Decision.

This case comes back in accordance with the opinion of the Supreme Court for the purpose of deducting from the amount of the assessment, heretofore confirmed and established by the judgment of this Court, of the cost to the defendant of the agreement to repair recited in the finding upon which the case was last taken to the Supreme Court.

The controversy arises over paragraph 8 of the finding. I am satisfied from the testimony that the sum of $ .37 per square yard was the amount allowed in the contract price for repairs, as specified in the contract, and was the cost to the defendant of the agreement to repair. Mr. Mansfield's testimony makes this clear.

For the purposes of this case it is perhaps not necessary to determine whether the contract was amended so as to show this division upon its face; but I am inclined to think that the testimony shows that the contract was so amended. Even in the absence of an amendment, Mr. Mansfield's testimony is explicit; and I think, taking the whole situation into account, he is substantially confirmed by Mr. Hill, the defendant's engineer. Mr. Mansfield stated that $2.93 was the contract price for the work, $ .37, for repairs, making a total of $3.30. Hr. Hill, making an estimate more than eight years later, places the fair value of the work of laying the pavement at $2.84: under all the conditions the difference is so slight that it is

quite clear that the division made by Mr. Mansfield was not an unreasonable or arbitrary division, and should be given full faith and credit. Whether or not the $ .37 a yard was sufficient is not the question. The value of the work actually to be done was capable of reasonably certain estimate. Repairs for ten years were entirely a question of estimate: as one witness said, substantially a guess; and it is further to be considered that the amount estimated was to be paid down at the beginning of the term during which the pavement was to be kept in repair.

The measurements in the rest of the finding were not dis-
288 puted. From the testimony with reference to paragraph 8, taken in connection with the rest of the finding, I find that the cost to the city of the agreement to repair contained in the contract for the work done for which the company was assessed $36,879 was $ .37 per square yard, or $3,590.85 in the whole, and that the assessment of $36,879 should be reduced by that amount, which leaves $33,288.15 as the amount of said assessment.

Judgment is therefore rendered that said assessment, confirmed and established by the judgment of this Court, dated March 25th, 1904, for $36,879, be modified by the deduction of said sum of $3,590.85, leaving $33,288.15, and that judgment be entered confirming and establishing said assessment so modified at the sum of $33,288.15.

GAGER, *J.*

[Indorsement:] New Haven County, Superior Court. Filed November 29, 1904. Gallagher, Ass't Clerk.

At a Superior Court held at New Haven, in and for New Haven County, on the 29th day of November, A. D. 1904.

Present: Hon. Edwin B. Gager, Judge.

New Haven County, Superior Court, November twenty-ninth, 1904.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY, a Corporation Located in New Haven,

vs.

THE CITY OF NEW HAVEN, a Municipal Corporation, Located in the County of New Haven.

Judgment.

This application for relief from the action of the court of common council in making an assessment against said plaintiff for the cost of a certain portion of an asphalt pavement in West Chapel street, in said New Haven, came to this Court on the first Tuesday of September, 1900, and thence by continuances to March 30th,
1902, when the parties appeared, and were at issue to the
289 Court on the pleadings, as on file; and the Court having heard the parties found that the assessment should be reduced to the sum of $5,823, and thereupon adjudged that said assessment be so

reduced, and be vacated and annulled so far as it exceeded said sum of $5,823, as appears by the files and records of this Court.

And thereupon the defendant appealed from the judgment of this Court to the Supreme Court of Errors, held at Bridgeport, within and for the Third Judicial District, on the fourth Tuesday of October, 1902, as appears by the record of this cause, to which reference is hereby made; and said Supreme Court found error in the judgment of this Court, and rendered judgment remanding the cause to this Court, to be proceeded with according to law; aand thence this cause came by continuances to the 25th day of March, 1904, when the parties appeared, and were at issue to the Court on the pleadings, as on file; and this Court having heard the parties found the issues for the defendant, and adjudged and decreed that the application of the plaintiff be dismissed, and that the assessment of $36,879 complained of be confirmed and established, as appears by the files and records of this Court.

And thereupon the plaintiff appealed from the judgment of this Court to the Supreme Court of Errors, held at New Haven, in and for the Third Judicial District, on the first Tuesday of June, 1904, as appears by the records of this cause, to which reference is hereby made; and said Supreme Court of Errors found error in part, and rendered judgment remanding this cause for a deduction from the amount of the assessment confirmed and established by the judgment of this Court of the cost to the defendant of the agreement to repair said pavement, in so far as said cost related to the pavement for which the plaintiff was charged in said judgment; and thence this cause came by continuances to the present time, when the parties appeared, and were at issue to the Court on the deduction referred to in the said judgment of the Supreme Court of Errors, and by said judgment directed to be made.

And this Court having heard the parties finds that the cost to the defendant of the agreement to repair said pavement, in so far as said cost related to the pavement for which the plaintiff is charged in the former judgment of this Court, was $3,590.85, and that the assessment of $36,879 complained of should be reduced by
290 that amount, and, except for such deduction, should be confirmed and established, namely, for the sum of $33,288.15.

Whereupon it is adjudged and decreed that the assessment of $36,879 complained of be and is hereby reduced by the deduction therefrom of the sum of $3,590.85, and that said assessment, except for said deduction, be confirmed and established, and that the defendant recover of the plaintiff its costs, taxed at — dollars.

GAGER, *J.*

From this judgment the plaintiff appeals to the Supreme Court of Errors, at its next term to be held at New Haven, in and for the Third Judicial District, on the third Tuesday in January, A. D. 1905; and George D. Watrous, Esq., of New Haven, is recognized in the sum of $100, conditioned that the plaintiff shall prosecute said appeal to effect, and pay all costs therein if it shall fail so to do.

perior Court, New Haven County, the 3rd day of December, 1904.

THE FAIR HAVEN AND WESTVILLE R. R. CO.
vs.
THE CITY OF NEW HAVEN.

Notice of Appeal.

Notice is hereby given that the plaintiff in the above entitled case peals to the next term of the Supreme Court of Errors.

THE FAIR HAVEN & WESTVILLE R. R. CO., *Plaintiff*,
By WATROUS & DAY,
TALCOTT H. RUSSELL,
Its Attorneys.

[Indorsement:] New Haven County, Superior Court. Filed Dec. 1904. Gallagher, Ass't Clerk.

1 New Haven County, Superior Court, December 28, 1904.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Finding.

1. The above entitled cause was before the Supreme Court of rors at the June term, 1904, and is reported in the 77th Connecti- t Reports, page 219. Pursuant to the decision of the Supreme urt of Errors said cause was tried to this Court for a deduction m the amount of the assessment confirmed and established by this urt by its judgment dated March 25, 1904 of the cost to the de- ndant of the agreement to repair recited in the finding before the preme Court of Errors, as aforesaid, in so far as said cost related the payment for which the plaintiff was charged in said judgment.

2. Upon the present trial all of the paragraphs except paragraph of the finding upon which said cause was before said Supreme urt of Errors at the June term, 1904 were admitted for the pur- ses of this trial, and are therefore adopted as part of the finding in is case. A copy of said finding, paragraphs 1 to 37, inclusive, ex- pt paragraph 8, is hereto attached, marked Exhibit A, and, together ith the exhibits therein referred to, is made part of this finding as ough herein set forth. [See pages 66 to 74, 7 to 14, and 40 57, inclusive, of this record.]

As to the matters referred to in said paragraph 8 I find the follow- g facts, to wit, the facts hereinafter set forth in paragraphs 3 to 0, inclusive, of this finding.

3. The price fixed by said contract, namely, $3.30 per square ard, included both the cost of the original construction and the cost

of maintaining in repair for the period specified in the contract, and the cost of construction and repair was not in said contract separated.

4. In making up said sum of $3.30 as its bidding price per square yard, and as the price at which its bid was finally accepted, said Boston Asphalt Company, the contractor, figured $2.93 per square yard as the cost of original construction of said pavement, and $ .37 per square yard as the cost of maintaining said pavement in
292 repair for the period required by the terms of the contract. The amount of its bid was based on such calculation: the contract as made was based on the same figures; and the cost to the city of the agreement to repair as set forth in said contract was in fact the sum of $ .37 per square yard.

5. It is not possible to calculate accurately in advance the actual expense of maintaining a pavement in repair for a considerable period as described in said contract and under the circumstances herein set forth, but the cost of original construction of pavement can be determined with substantial accuracy, and it was so determined by said Boston Asphalt Company at said sum of $2.93 per square yard, and said sum was a reasonable and proper price for such original construction.

6. With reference to the proposed amendments to the contract between the city of New Haven and the Boston Asphalt Company mentioned in paragraph 9 of the former finding, and herein adopted, said city on October 5th, 1896 took such action as appears in Exhibit 9 hereto attached, and made part of this finding.

7. The Boston Asphalt Company made the proposition referred to in paragraph 6 of this finding, by letter.

8. The American Surety Company duly consented to said amendment as required by the last of the votes of the boards of aldermen and councilmen set forth in Exhibit 9.

9. The total number of square yards upon which the plaintiff was assessed the sum of $36,879, as set forth in the finding, Exhibit A, was 9,705, and the cost to the city of this agreement to repair the pavement covered by said assessment at $ .37 per square yard, as mentioned in paragraph 4 of this finding, was $3,590.85.

10. Deducting $3,590.85, the cost to the city of said agreement to repair, as hereinbefore set forth, from $36,879, the assessment established and confirmed by the judgment of this Court dated March 25, 1904, there is left the sum of $33,288.15 as the amount of said assessment which should be borne by the plaintiff; and the original assessment appealed from is modified, confirmed, and established at and for said sum of $33,288.15 as appears by the judgment as on file.

293 *Claims of Law.*

11. The plaintiff made the following claims of law in the manner hereinafter set forth in paragraph 12, to wit:

The plaintiff claims and asks the Court to rule that the assessment of $36,879 against the plaintiff was void:

(1.) Because the Act of 1895 was repealed by the Act of 1899,

nd therefore no assessment under the Act of 1895 could be sup-
orted, and it should be annulled, or reduced to $5,623.

(2.) Because the assessment of $36,879 was made without any
nquiry or finding of benefit to the railroad, and because the law
nder which said assessment was made does not call for any inquiry
r finding, but is wholly arbitrary.

(3.) Because as a matter of fact there is no benefit whatsoever to
he road.

(4.) Because the indirect benefit, consisting in the tendency of
he pavement to increase the population and consequent traffic in
hat section of the city, is not such a benefit as will sustain an assess-
ient.

(5.) Because, for the reasons in claims (2), (3), and (4), said
ssessment is a violation of Article XIV of the Amendments of the
Constitution of the United States, as depriving the plaintiff of prop-
rty without due process of law, and because said assessment and said
Act of 1895 deny to the plaintiff the equal protection of the laws.

(6.) Because said assessment includes the cost of keeping said
avement in repair, and said amount is not separated or separable
rom the general assessment; and because said cost of repair cannot
e made a legal basis of assessment against the railroad, but should
e paid from general taxation.

(7.) Because plaintiff is assessed and compelled to pay from gen-
ral taxation its proportion of the expense of the paving of said
treet, and, if subjected to this assessment, is compelled to pay twice
for the same thing.

(8.) Because the plaintiff is bound under its charter and the laws
of the State to keep the space between the tracks and for two feet
on each side in repair, which obligation stands unrepealed; and
the plaintiff could not legally be subjected to an assessment for the
expense of doing that which it is still bound to do itself.

294 (9.) Because it appears from the finding that over the
whole of its route on West Chapel street at least one line of
track was in use at the time that said street was paved in 1873 or
1874, and said company has been assessed therefore; and because
said company cannot again be compelled to pay the cost of paving the
space between and for two feet outside of such single line of track, as
its obligation thereto is to keep the same in repair only.

(10.) Because said assessment should be reduced by the cost of
constructing the asphalt pavement, in so far as the same relates to its
track as laid prior to the passage of the order for such asphalt pave-
ment, inasmuch as it appears that from Howe street to York street a
single line of track was then in use, and a double track for the greater
portion of the distance between Howe street and Sherman avenue,
and a single track for the remaining distance of its route on Chapel
street. Neither the charter, nor the general law, nor any contract
between the company and the city or state, requires paving or repav-
ing any portion of the street for the paving of which it has been as-
sessed.

(11.) Because the Act of 1895, so far as it authorizes this assess-
ment against the plaintiff, is void, because it impairs the obligation

of the contract with the plaintiff contained in its original charter, Private Acts of 1860, p. 370, which provides that said company shall keep that portion of the streets and avenues through which said road or way shall be laid down, with a space of two feet on each side of their track or way, in good and sufficient repair, without expense to the city or town of New Haven, or the owners of land adjoining said track or way, and said Act is therefore in violation of section 10 of Article I of the Constitution of the United States.

(12.) Because said Act of 1895, so far as it authorizes said assessment against the plaintiff, is in violation of the contract contained in the amendment to the charter of The Fair Haven & Westville Railroad Company, Private Acts of 1864, p. 655, by which it was authorized and empowered to lay and operate its tracks over the portion of Chapel street affected by the said assessment, subject to the provision of the ninth section of the original charter of said company. Said Act, so far as it authorized said assessment, is in violation of the tenth section of Article I of the Constitution of the United States.

(13.) Because neither the ninth section of the original
295 charter of the company, nor the amendment, nor the Act of 1895, section 6, requires the plaintiff to pave or repave any portion of the streets, and the Act of 1895 cannot be supported as a change in the form of the obligation.

(14.) Because that portion of section 9 of the charter of the company which reads as follows: "The Common Council of the City of New Haven may from time to time establish such regulations in regard to said railroad as may be required for the paving, grading, sewerage, and the laying of gas and water pipes in and along said streets," does not give to the city any power to order pavements, or the payment of the expense of pavements by the road, but means simply that the railroad shall comply with such rules and regulations as will enable the city to complete its operations of paving, grading, sewerage, and the laying of gas and water pipes.

(15.) Because no general statute or law of this State authorizes any such assessment, or the imposition of any pecuniary burden, except when such company has failed, and after order, refused, to keep such portion of the street in good and sufficient repair.

(16.) Because said Act of 1895, so far as it affects the railroad, is not a public regulation. It does not on its face bear any evidence of being such, or to have been governed or dictated by considerations appropriate to a police measure, but on the contrary purports to be and is a simple revenue measure.

(17.) Because there is no necessity for such an Act to enforce any legitimate police regulations. The provision of the charter of the plaintiff and the Act of 1893 require the company to repair and keep the road in good condition. Such a charge could not be justified under the police power, even if the Act were so intended, as there was nothing to justify or necessitate such a requirement of the railroad.

(18.) Because the Special Act approved July 1st, 1895 is not a general law imposing a police regulation to protect the public health, morals, or safety, nor is it a condition lawfully imposed upon the ex-

ercise of the franchise conferred upon the plaintiff, but impairs the obligation of the contract between the State of Connecticut and the applicant, as contained in applicant's charter and amendments, and is therefore unconstitutional, and in violation of section 10 of Article I of the Constitution of the United States.

296 (19.) Because the Special Act approved July 1st, 1895 is not a valid exercise of the police power reserved to the State of Connecticut, in that it arbitrarily imposes a pecuniary burden upon the applicant, and is not passed to protect the health, morals, or safety of the community, and said Special Act is therefore unconstitutional and void, in that it deprives the applicant of its property without due process of law, and denies it the equal protection of the laws, contrary to the provisions of Amendment XIV of the Constitution of the United States, and deprives the plaintiff of its property without just compensation, contrary to the provisions of section 2 of Article I of the Constitution of the State of Connecticut.

(20.) Because the assessment appealed from purports to be, and if of any effect is, an assessment for special benefits to the property of the applicant, but if not, it constitutes a statutory obligation to pay money, which cannot be sustained without proof that a payment of this character was, under the circumstances, necessary to protect the public against an unsafe condition of West Chapel street, caused by the presence of applicant's tracks, or to operations of its railroad, the burden of proof being on the city.

(21.) Because an order to a street railway corporation to pay the cost of a pavement which is a direct damage to the corporation cannot be sustained without proof that the tracks of said company constitute a nuisance in the highway, and that such an order was reasonably necessary in order to compel the company to respond to its charter and statutory obligations to keep 18 feet of West Chapel street in repair.

(22.) Because an Act or Resolution requiring any individual or corporation to pay a portion of the expense of any public work, or a portion of the expense required to carry on the government of a municipality, or of discharging its ordinary police duties, besides what it is compelled to pay by the general tax laws, cannot be sustained unless it appear that there is a direct and special benefit to said individual or corporation, or unless it appear that said expenditure is necessary in order to obviate some nuisance or inconvenience for which said corporation or individual is responsible. The plaintiff in this case is not so benefited, nor is the expenditure for which it is assessed in any way necessary to the prevention or removal of

297 any nuisance or inconvenience for which the plaintiff is responsible. Said assessment, therefore, and the Act of 1895, so far as it authorized such an assessment, are void and illegal, and take the property of the plaintiff without due process of law, and without compensation, and deny to the plaintiff the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States.

(23.) Because no interest should be allowed, as the obligation of the company, if any, is not based upon an assessment of benefits, but

upon a statutory obligation, the amount of which has not hitherto been legally ascertained, and because interest thereon is not legally collectible, even though the assessment appealed from be deemed an assessment of benefits.

(24.) Because said Act of 1895, so far as it affects the railroad company, does not purport to be an amendment to the charter of the railroad company, and cannot be supported as such.

(25.) Because said Act of 1895, if purporting to be an amendment to the charter, would not be valid, and it is an attempt to take and to affect the property rights of the plaintiff without due process of law, and as such cannot be justified under the power of amendment.

(26.) Because the Special Act approved July 1st, 1895, entitled "An Act Authorizing the City of New Haven to Issue Street Pavement Bonds," cannot be deemed to be an amendment of the applicant's charter for the following reasons:

(*a.*) Because it purports to affect the Charter of the City of New Haven only.

(*b.*) The applicant is not named in said Act otherwise than by reference in the phrase, "on all streets occupied by the track or tracks of any railroad company or companies," etc.

(*c.*) Said Act is not a general statute, but a special law.

(*d.*) It is not in name or effect a police regulation for the health or safety of the public.

(*e.*) It is an Act special in its character, and imposing a pecuniary burden upon such of the railways of the State only as are within the city of New Haven.

(*f.*) It does not appear that said so-called amendment was accepted by the stockholders of the applicant within six months after its passage, or that it is otherwise specially provided in said Private Act.

298 (*g.*) It does not appear that the applicant appeared or was cited to appear before the General Assembly of 1895 with respect to an amendment to its charter in the manner imposed in said Private Act.

(27.) Because said Act of 1895, so far as it affects the railroad, cannot be supported as a franchise tax. It does not purport to be such, and is not general in its nature, but lays special burdens upon individual corporations.

(28.) Because said Act of 1895, if construed as a franchise tax, and the assessment thereunder, are void, because they assume to deprive the plaintiff of the benefit of the contract contained in its charter.

(29.) Because the obligation, if any, imposed upon the applicant under the Special Act approved July 1st, 1895 does not include the right to require the applicant to repave the space between the tracks and two feet on the outer side of the outer rails, when the greater portion of such space was already paved, and the applicant has already been assessed therefor.

(30.) Because the Act of 1895, so far as it purports to authorize the city to impose upon the railroad the cost of paving the space

between the rails and two feet on either side, is for the reasons specified in the claims herein above mentioned, consecutively, from 6 to 29, inclusive, in violation of Article XIV of the Amendments of the Constitution of the United States, and section 10 of Article I of said constitution, because it impairs the obligation of contracts with the plaintiff, and because it deprives the plaintiff of its property without due process of law, and denies to the plaintiff the equal protection of the laws.

(31.) Said assessment of $36,879 is void, because it is, for the reasons specified in the claims herein above mentioned, numbered consecutively from 6 to 29, inclusive, in violation of Article XIV of the Amendments of the Constitution of the United States, and section 10 of Article I of said constitution, because it impairs the obligation of contracts with the plaintiff, and because it deprives the plaintiff of its property without due process of law, and deprives the plaintiff of the equal protection of the law.

(32.) The amendment to the application, dated the 5th day of October, 1904, should not have been disallowed on the ground that the Court had not the power to allow the same.

299 (33.) The Court had the power to allow the plaintiff's motion for leave to file amendment to application, dated October 5th, 1904, which was denied October 28th, 1904, for lack of such power.

(34.) The letter of The Boston Asphalt Company, dated October —, 1896, Exhibit 4 referred to in Exhibit 9, together with the vote of common council, approved October 14th, 1896, Exhibit 9, and the latter of The American Surety Company, dated October 8th, 1896, Exhibit 10, did not constitute in law an amendment of the contract for the construction of said pavement, as the original contract was under seal, and neither said letter nor said resolution was under seal.

(12.) None of said claims of law were presented at the time of the argument upon the present hearing, and discussed before the Court except (6.), as to the claim that said sum of $3.30 was not separable into original cost of construction, and cost of keeping said pavement in repair, and (34.), as to the effect of the action of the parties subsequent to the making of said contract, relating to the amendment to said contract, as set forth in paragraphs 6, 7, and 8 of this finding. All of said claims, numbers (1.) to (31.), inclusive, are the same claims made upon the last previous trial of this cause, as appears in the finding therein, and, with the exception of claim (6.), above referred to, were first specifically called to the attention of the Court after the conclusion of the arguments, but before the decision of the present case. Due notice of said claims was given to the adverse party.

(13.) The defendant made the following claims of law:

(1.) That the only issue before the Court on this trial was the cost of the agreement to repair.

(2.) The question whether interest should run is not before the Court. The only question is whether the assessment should be confirmed, annulled, or modified. Unless wholly annulled, interest

follows as a legal consequence, and incidental to the proceedings by which said assessment may be collected. No allegation is made in the complaint concerning interest; no prayer for relief from the burden of interest is made: no claim has, until after the adoption of this finding of facts, been presented in Court by the plaintiff concerning the allowance of interest.

(3.) If the question should be considered by the Court, judgment should be that the plaintiff pay interest on the assessment at
300 six per cent. per annum, from the day on which this application was dated, namely, May 28th, 1900, to the date of final payment.

(14.) The Court overruled all the claims of the plaintiff, sustained the claims (1.) and (2.) of the defendant, and having sustained defendant's claim (2.) did not consider defendant's claim (3.), and thereupon rendered judgment as on file.

(15.) The finding of facts hereinbefore set forth is the finding of facts upon which the judgment in said cause is based, and is made part of the record. GAGER, *J.*

[Indorsement:] New Haven County, Superior Court. Filed Dec. 29, 1904. Gallagher, Ass't Clerk.

Exhibit A.

[See pages 66 to 74, 7 to 14, and 40 to 57, inclusive of each and all, of this record.]

Exhibit 9.

New Haven, Conn., *October* 5, 1896.

To the Honorable Court of Common Council of the City of New Haven.

In accordance with the authority conferred upon us by your resolutions we have received from The Boston Asphalt Co. a proposition as follows: "Amend the contracts entered into by the city of New Haven and The Boston Asphalt Co. by changing paragraph *m*, on p. 12 in the manner and form set out in the inclosed resolutions: the amendment to be first adopted by the court of common council, and then The Boston Asphalt Co. will agree to it.

If this can be done, while it may not accomplish the desired purpose, it will, provided the company giving bonds for The Boston Asphalt Co. consent, in our opinion accomplish everything possible to make the assessments legal.

If the resolutions amending the contracts are passed, they should be conditioned upon the consent of the company which
301 signed the bond to secure the performance of the contracts entered into by The Boston Asphalt Co.

Respectfully submitted,

A. C. HENDRICK, *Mayor.*
WM. H. ELY,
Corporation Counsel.

Resolved, that the contract heretofore entered into by and between the city of New Haven and the Boston Asphalt Company for the paving of Orange street is hereby amended by adding to the same after the word "namely" in paragraph *m*, on page 12, the following words, to wit: "for the original construction of each square yard of surface of roadway paved the sum of two dollars and ninety-three cents, and for the cost of keeping said pavement in repair for the term of ten years, the sum of eight cents per square yard."

Resolved, that the contract heretofore entered into by and between the city of New Haven and The Boston Asphalt Company for the paving of West Chapel street is hereby amended by adding to the same after the word "namely" in paragraph *m*, on page 12, the following words, to wit: "for the original construction of each square yard of surface of roadway paved the sum of two dollars and ninety-three cents, and for the cost of keeping said pavement in repair for the term of ten years, the sum of thirty-seven cents per square yard."

Resolved, that the contract heretofore entered into by and between the city of New Haven and The Boston Asphalt Company for the paving of Trumbull street is hereby amended by adding to the same after the word "namely" in paragraph *m*, on page 12, the following words, to wit: "for the original construction of each square yard of surface of roadway paved the sum of two dollars and ninety-seven cents, and for the cost of keeping said pavement in repair for the term of ten years, the sum of eight cents per square yard."

Voted, that the proposed resolutions be adopted, upon the condition that The American Surety Company consent that the original contract be amended to that extent.

Board of Aldermen, October 5, 1896.

Report accepted, and resolutions and vote adopted.

RICHARD F. LYON,
City Clerk.

302 Board of Councilmen, October 12, 1896.
Concurred.

EDWARD A. STREET,
Ass't City Clerk.

October 14, 1896.
Approved.

A. C. HENDRICK.

Attest: RICHARD F. LYON,
City Clerk.

I hereby certify that the foregoing is a true and correct copy of the original as recorded on pages 180, 181 of the records of the Court of Common Council, City of New Haven,

Attest: HENRY E. NORRIS,
City Clerk, City of New Haven, Connecticut.

November 11, 1904.
[SEAL.]

New Haven County, Superior Court, January 3, 1905.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY
vs.
THE CITY OF NEW HAVEN.

Plaintiff's Appeal.

In the above entitled cause the plaintiff appeals from the judgment of said Court to the Supreme Court of Errors next to be held at New Haven, within and for the Third Judicial District, on the third Tuesday in January, 1905, for the revision of the errors which the plaintiff claims to be apparent on the face of the trial record, and to have occurred in the trial thereof; and for reasons of said appeal the plaintiff assigns the following:

1. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (1.).
2. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (2.).
3. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (3.).
4. The Court erred in overruling the plaintiff's claim of law stated in its claim number- (4.).
5. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (5.).

303 6. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (6).

7. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (7.).
8. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (8.).
9. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (9.).
10. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (10.).
11. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (11.).
12. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (12.).
13. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (13.).
14. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (14.).
15. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (15.).
16. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (16.).
17. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (17.).
18. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (18.).

19. The Court erred in overruling the plaintiff's claim of law ıted in its claim numbered (19.).
20. The Court erred in overruling the plaintiff's claim of law ıted in its claim numbered (20.).
21. The Court erred in overruling the plaintiff's claim of law ıted in its claim numbered (21.).
22. The Court erred in overruling the plaintiff's claim of law ıted in its claim numbered (22.).
23. The Court erred in overruling the plaintiff's claim of law ıted in its claim numbered (23.).
(24.) The Court erred in overruling the plaintiff's claim of law ıted in its claim numbered (24.).
25. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (25.).
)4 26. The Court erred in overruling the plaintiff's claim of law stated in its claim numbered (26.).
27. The Court erred in overruling the plaintiff's claim of law ıted in its claim numbered (27.).
28. The Court erred in overruling the plaintiff's claim of law ıted in its claim numbered (28.).
29. The Court erred in overruling the plaintiff's claim of law ıted in its claim numbered (29.).
30. The Court erred in overruling the plaintiff's claim of law ıted in its claim numbered (30.).
31. The Court erred in overruling the plaintiff's claim of law ıted in its claim numbered (31.).
32. The Court erred in overruling the plaintiff's claim of law ıted in its claim numbered (32.).
33. The Court erred in overruling the plaintiff's claim of law ıted in its claim numbered (33.).
34. The Court erred in overruling the plaintiff's claim of law ıted in its claim numbered (34.).
35. The Court erred in ruling in favor of the defendant's claim law stated in claim numbered (1.).
36. The Court erred in ruling in favor of the defendant's claim law stated in claim numbered (2.).
37. The Court erred in ruling that it had no power to allow the nendment dated the 5th day of October, 1904.
38. The Court erred in disallowing said amendment on the round that it had no power to allow the same.

Plaintiff therefore prays for such relief as is provided by law in ıe premises.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY,
By WATROUS & DAY,
TALCOTT H. RUSSELL, *its Attorneys.*

I certify that the foregoing appeal was filed on the 4th day of ıuary, A. D. 1905; and George D. Watrous, Esq., of New Haven, recognized in the sum of $100, conditioned that the said The Fair laven & Westville Railroad Company shall prosecute said appeal to

effect, and pay all costs therein if it shall fail to do so; and said appeal is hereby allowed.

JOHN CURRIER GALLAGHER,
Assistant Clerk.

305 Supreme Court of Errors, New Haven County.

CLERK'S OFFICE.

The above and foregoing is a true copy of the record in said case to be used in the trial in the Supreme Court of Errors.

Attest: EDWARD A. ANKETELL, *Clerk.*

Table of Contents.

	PAGE
Application	1
Citation	5
Exhibit A (Act concerning permanent pavements in the city of New Haven)	5
Exhibit B (Report of bureau of compensation as amended)	7
Opinion of corporation counsel, dated Feb. 6, 1900.	12
Motion for leave to file motion to strike out portions of the application	14
Motion to strike out portions of the application	15
Motion for leave to file amendment to the application	16
Amendment to the application	16
Motion to strike out par. 10½ of the amendment to the application	17
Memorandum of decision of motion to strike out par. 10½ of the amendment to the application	17
Demurrer to portions of the application as amended	19
Memorandum of decision on the demurrer	20
Answer	21
Amendment to the answer	21
Memorandum of decision	22
Judgment of 1902	25
Defendant's notice of appeal	28
Finding at trial in 1902	28
Defendant's claims of law	38
306 Exhibit F (Contract between def't and Boston Asphalt Co. for paving Chapel st. between York st. and the Boulevard	40
Bond	53
Exhibit 1 (Notice served on pl'ff by the bureau of compensation July 23, 1898)	54
Exhibit 2 (Report of bureau of compensation on assessments, rendered August 1, 1898)	55
Exhibit 3 (Report of committee on streets to the common council, recommending adoption of assessments made by the bureau of compensation)	56

Exhibit 4 (Report of Committee on streets to the common council, recommending that the reports of the bureau of compensation be referred back to that body) 56
Exhibit 5 (Vote passed by boards of aldermen and councilmen instructing the bureau of compensation to levy assessments for permanent pavements) 57
Exhibit 6 (Schedule of items of cost of work done by the def't in connection with construction of the pavement in question) 57
Defendant's appeal, 1902 57
Bill of exceptions 60
Memorandum of Judge Elmer, dated July 31, 1903 63
Judgment of March, 1904 64
Notice of appeal 66
Finding at trial in March, 1904 66
Plaintiff's claims of law 74
Defendant's claims of law 80
Plaintiff's appeal from judgment of March, 1904 81
307 Motion for leave to file amendment to the application. 84
Proposed amendment 84
Memorandum of decision on motion for leave to file an amendment to the application 86
Judgment of November, 1904 87
Notice of appeal 89
Finding at trial in November, 1904 90
Plaintiff's claims of law 92
Defendant's claims of law 98
Exhibit A, pp. 66 to 74, 7 to 14 and 40 to 57, inclusive.
Exhibit 9 (Action of the city of New Haven with reference to proposed amendments to the paving contract 99
Plaintiff's appeal from judgment of Nov., 1904 101

308 FAIR HAVEN & WESTVILLE R. Co.
vs.
CITY OF NEW HAVEN.

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Statutory application by the Fair Haven & Westville Railroad Company for relief from an assessment made by the common council of the city of New Haven against plaintiff on account of the construction of a pavement in a street. From a judgment reducing, pursuant to the mandate of the Supreme Court, an assessment against the plaintiff, and confirming and establishing the assessment as reduced, plaintiff appeals. Affirmed.

Talcott H. Russell and George D. Watrous, for Appellant.

Leonard M. Daggett and E. P Arvine, for Appellee.

PRENTICE, *J.*

This is the third appearance in this court of this proceeding, which is in the nature of an appeal from an assessment laid against the plaintiff, a street railway corporation, by the defendant city, on account of the cost incurred in 1897 by the paving with asphalt of one of its streets, through the center of which a double line of the plaintiff's tracks extended. The facts out of which the controversy arises are fully detailed in the reports upon the former appeals, 75 Conn. 442, 53 Atl. 960; 77 Conn. 219, 58 Atl. 703. Only a few of them need be here recalled.

In 1895 a special act was passed (12 Sp. Laws, p. 565) authorizing the defendant city to bond itself to raise moneys for paving construction, and to expend the moneys so raised for that pur-
309 pose. The act provided for the assessment of a portion of the cost of such work upon abutting land owners, and another portion upon any street railway company or companies occupying with its tracks any street so paved. The portion to be so assessed against any such railway company was by the act fixed as the cost of paving and repaving "the full length and nine feet wide for each and every line of track." The defendant, in making its assessment, attempted to apply this rule. From the assessment of $36,879 thus arrived at, the plaintiff brought to the Superior Court its application for relief. That court sustained the plaintiff's contention that the provision of the act of 1895 recited, and upon which the defendant's assessment was based, had prior thereto been repealed by another special act, enacted in 1899 (13 Sp. Laws, p. 181), and that the only provisions of law authorizing any assessment were those contained in said last-named act, which were limited to the assessment for benefits and damages assessed "for or against all owners of property abutting upon or adjoining the streets in which such pavements are constructed." The court overruled the plaintiff's further contention that it was not an owner of property abutting or adjoining the street within the mean- of the act, and that therefore no assessment could be made against it, and assessed the plaintiff the sum of $5,823. From this assessment the city took the first appeal to this court. 75 Conn. 442, 53 Atl. 960. We then decided:

(1) That the only section of the act of 1899 which did not relate to future paving construction, to wit, section 3, was not intended to, and did not, relate to the ascertainment of the share of the cost of street paving completed prior to the passage of the act which might be cast upon a street railway company occupying with its
310 tracks the paved street, and was not intended to, and did not, operate to repeal, change, or modify the provisions upon that subject of the act of 1895 which was in force when the work was done.

(2) That the act of 1895 furnished the only rule prescribed by statute for the ascertainment of the share of the burden of the cost of the pavement construction in question which the city might impose upon the plaintiff, and that the imposition of the share so ascertained was in terms authorized by said act.

(3) That said provisions of the act of 1895, which, in terms, were

that "on all streets occupied by the track, or tracks of any railway co....pany or companies, said company or companies shall be assessed and shall severally pay to the city the cost of paving and repaving the full length and nine feet wide for each and every line of track," etc., were not intended to provide a rule for the assessment of benefits accruing to property owners by reason of a public work, nor to provide a basis for taxation, but to prescribe a measure of the burden which the plaintiff, as a quasi public corporation, enjoying at the hands of the state, and for its own benefit and advantage, certain special privileges in the highway and in the roadbed thereof, ought reasonably to bear with respect to the maintenance of that highway.

(4) That said provisions of said act were not such that we could say of them that they required of the plaintiff, as a corporation operating under public authority a railway in a public street, anything that was unreasonable; that the burden thereby imposed was unreasonably cast; or that the burden was in any respect arbitrary, oppressive, partial, or unequal.

(5) That said provisions of said act, interpreted as indicated in paragraph 3, above, and being of the character indicated in
311 paragraph 4, were within the power of the General Assembly to enact, and were not violative of any constitutional prohibition of this state or of the United States, since they embodied a valid exercise of both what is commonly termed the "police power" and the reserved power of amendment of the plaintiff's charter, by and under which its franchise in the highway was derived and is enjoyed.

(6) That those features of the act which required the plaintiff to pay the cost of a specified portion of the work done, gave the plaintiff no opportunity to itself do the work, permitted the city to do it, and required the plaintiff to pay the city the cost, were not such as were forbidden by fundamental law.

(7) That the objection urged in the bill of exceptions to the amount of the city's assessment, to wit, that it included items of expense not involved in the cost of paving the 18 feet of width chargeable under the act to the plaintiff, did not call for decision, since the correctness of that assessment was not then in question, and the considerations urged were properly to be addressed to the trial court upon the remandment of the cause for a new assessment as ordered.

Error was thereupon found, and the cause remanded.

Upon the rehearing to determine the amount which should be assessed under the provisions of said act of 1895, the Superior Court confirmed the city's assessment of $36,879. The plaintiff thereupon appealed, assigning as error not only those rulings which the court made pursuant to the former decision of this court, but also others which were either not presented upon the former appeal, or not then passed upon. Upon that appeal we reaffirmed, without discussion, our former rulings, and further held:

312 (8) That the assessment thus confirmed included not only the cost of paying that portion of the street specified in the statute, but also the cost of keeping the same in repair for a period

of years, and was therefore, and to that extent, unwarranted and improper.

(9) That said cost of repair was not, either inherently or upon the facts disclosed by this case, so incapable of separation from the cost of construction that the latter could not be ascertained, and an award therefor made, as the statute requires.

(10) That the claim then for the first time made, that the assessment laid was neither in whole or in part invalid, as being the result of an unlawful and unconstitutional exercise of the power conferred to the terms of the act of 1895, since the street had been paved, in whole or in part, 23 years prior to the laying of the present pavement, and the plaintiff had then been assessed and had paid a portion of the cost thereof, and especially since the city had failed to show the propriety or necessity of the new pavement as a means of repair, was one of which the plaintiff could not take advantage, for the reason that neither the original application, nor any subsequent pleadings in amendment to or supplement of it, furnished any foundation for it, and for the further reason that as the plaintiff had not given any notice of an intention to make the claim, and by such notice put the city to the proof of facts to meet it, the latter's failure to make such proof could not, in fairness, be used to its disadvantage in a way of which no warning had been given.

Error in part was therefore found, and the cause remanded for a deduction from the amount of the assessment confirmed of that portion of it which represented cost of repair.

313 Upon the return of the cause the plaintiff moved for leave to amend its application by adding therto six paragraphs, setting out reasons, including those hereinbefore noticed, why the assessment, either in whole or in part, represented an unlawful and unconstitutional exercise of the authority in terms conferred by the act of 1895. This leave the court declined to give, upon the double ground (1) that it had no power to allow the desired amendment; and (2) that it ought not, as a matter of discretion, to be allowed.

Upon the hearing the court found that the cost to the city of the construction of the pavement was $2.93 per square yard, and the cost of the agreement to repair 37 cents per square yard. As the total number of square yards of paving chargeable to the plaintiff under the provisions of the act of 1895 was found to be 9,705 square yards, the total cost of said paving was found to be $33,288.15 and the cost of the agreement to repair $3,590.85; the two sums together making the sum of $36,875, for which amount the original assessment had been made. The court therefore eliminated said $3,590.85, and confirmed and established the assessment at the sum of $33,288.15. The plaintiff thereupon again appealed, renewing its former reasons of appeal, and adding four others, based upon the above, recited action of the court subsequent to the last remand of the cause. These four reasons of appeal, as the plaintiff concedes, involve only two claims of error, to wit: (1) That the court erred in refusing to allow the proposed amendment to the application; and (2) that it erred in holding that the contract for the paving, as originally entered into, which stipulated that the price for its construction and maintenance

for the specified term was to be $3.30 per square yard—the
314 same being under seal—was thereafter, and before the construction of the paving, effectually amended by the action of the parties thereto, not under seal.

The Court was correct in its ruling upon the motion for leave to amend. A new trial was not awarded. On the contrary, the case was returned, as is frequently done, with a mandate defining and limiting the duty of the trial court. Rules of the Supreme Court, p. 109, sec. 63. This mandate was controlling upon the action of the superior court, and prevented it from opening up the case anew.

The second claim of error involves the assumption that the trial court found an amendment of the original contract as stated. The finding furnishes no warrant for this assumption, either in what is expressly found, or in what arises by necessary inference therefrom. The finding that the cost to the city of the agreement to repair was 37 cents per square yard is by no means legally inconsistent with the fact, if such it was, that the work was done under a contract which called for both original construction and maintenance for a period of years, and the price named therein was a gross sum, and not separate sums for each of the obligations assumed by the contractor.

Our former rulings upon the matters in controversy are affirmed.

The plaintiff's brief urges that any rule which may have forbidden the trial court to allow its proposed amendments ought, under the circumstances of this case, to be relaxed in its favor. The circumstance especially relied upon to support this appeal arises from the plaintiff's apparent conception that some obscure or stringent rule of pleading was upon the former appeal invoked and applied in
315 such a way as to work a hardship upon the plaintiff, and deprive it of its right to claim that the city's attempt to enforce an assessment under the circumstances of the case was an unconstitutional exercise of power in terms conferred by the act of 1895. Indeed, the brief seems to intimate that we must have originated a code of pleadings applicable to proceedings of this character. Even a cursory reading of the former opinion discloses the plaintiff's misconceptions of it in this regard. The only principles invoked by us were two, and neither was original, stringent, or obscure. The first was the familiar one applicable to appeals and proceedings in the nature of appeals—that when the appellant or applicant, whether required to do so or not, does in fact set out his reasons of appeal or grounds for relief, he will be limited in his evidence to the matters so set out. St. Leger's Appeal, 34 Conn., 434, 91 Am. Dec. 735; Hart's Appeal, 32 Conn. 520; Mix's Appeal, 35 Conn. 121, 95 Am. Dec. 222. The second was the rule of common fairness, that when one party to a cause, by his silence, when if ever, it was his duty to speak, has naturally induced conduct on the part of his adversary, he will not be permitted to take advantage of any act or omission so induced, to the latter's disadvantage. The pertinence of this rule to the plaintiff's attempt to make capital out of the defendant's failure to offer proof of certain facts in rebuttal of a claim for which no foundation has been laid, and of which no notice had been given, seemed too apparent to require elaboration. Two other principles

might have been invoked in aid of the two named, had it seemed necessary to further demonstrate that the claim which the plaintiff was undertaking to assert was one which could have no standing in the case. The first of these is that which forbids evidence
316 offered and admitted, as that in question was, for a limited purpose, and facts found upon such evidence to be used for another and totally different purpose. The second is to the effect that as the question of the constitutionality of an assessment under the provisions of the act of 1895 had been presented for decision upon the plaintiff's bill of exceptions, made a part of the first appeal, and had been fully argued and decided, the question was no longer an open one in the case, and the defeated party could not be permitted to gather additional facts, and frame and urge new reasons to secure a revision of the decision.

The plaintiff was not surprised by the appearance or importance of the constitutional question upon the first appeal. It itself presented the question and argued it at length. It was its duty, therefore, to make its application sufficient to support the claims desired to be made, and present those claims then and there. If it failed to do so, the responsibility for the result cannot be laid to the charge of the court. Neither can that failure, nor the discovery of new point of possible attack, be made the basis of an appeal to judicial discretion, if such existed, for permission to undo what had already been accomplished by long-continued litigation, which ought, if possible, to be permitted to represent some permanent results.

The plaintiff, in its brief, asks us to define more clearly than was done in our last opinion the claims which come within the ruling then made as hereinbefore stated in paragraph 10 of the resume of our rulings. If any more precise statement could be deemed necessary, we would say that we intended to include any claim
317 that the assessment, if confirmed, would, under the circumstances of the present case, be, either in whole or in part, the result of an unlawful and unconstitutional exercise of the legislative power, for the reason or reasons that the whole or a portion of said street had once been paved, the plaintiff being assessed and paying a part of the cost thereof; that the defendant had not shown the propriety or need of the repavement as a measure of repair; that it had not shown that some proper public authority had passed upon that question, or other reasons peculiar to this particular work, and not arising from the general operation of the statute.

There is no error. All concur.

318 At a Supreme Court of Errors held at New Haven in and for the Third Judicial District, on the third Tuesday of January, A. D., 1905.

Present, Hon. David Torrance, Chief Justice; Hon. Simeon E. Baldwin, Hon. William Hamersley, Hon. Frederic B. Hall, Hon. Samuel O. Prentice, Associate Judges.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY, a Corporation Located in the Town of New Haven,

vs.

THE CITY OF NEW HAVEN, a Municipal Corporation Located in the County of New Haven.

On Appeal from the Superior Court.

Judgment.

This appeal by the applicant claiming error in the process, record, and judgment, and in the proceedings and decisions of the court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts on file in this Court, was allowed by the Superior Court for New Haven County on the 4th day of January, A. D. 1905, and came to this Court, at its term held at New Haven on the third Tuesday in January, A. D. 1905, when the parties appeared and were fully heard.

And now this Court finds that in the record, judgment, and proceedings of said Superior Court there is no error.

319 It is therefore considered and adjudged that the said judgment be confirmed and established and the appellee recover of the appellant its costs taxed at $—.

Date of Judgment, April 20th, 1905.

By the Court,

JOHN S. FOWLER,
Assistant Clerk.

320 *Return to Writ of Error.*

STATE OF CONNECTICUT,
New Haven County, Third Judicial District, ss:

In obedience to the commands of the within writ, I, Edward A. Anketell, Clerk of the Supreme Court of Errors of the State of Connecticut for the Third Judicial District, hereby make return to the foregoing writ of error, and herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same, together with original writ of error and affidavit of service thereof; the original citation and affidavit of service thereof, together with copies of the petition for writ of error, allowance thereof, assignment of errors, and bond; and I hereby certify that the original writ of error, together with a copy thereof for the City of New Haven, and the original of said bond were lodged in my office on the 26th day of June, A. D. 1905.

Witness my hand and the seal of the Supreme Court of Errors of the State of Connecticut, this 21st day of July, A. D. 1905.

[SEAL.] EDWARD A. ANKETELL,
Clerk of the Supreme Court of Errors of the State of Connecticut for the Third Judicial District.

321 STATE OF CONNECTICUT,
New Haven County, Third Judicial District, ss:

I, Edward A. Anketell, Clerk of the Supreme Court of Errors of the State of Connecticut for the Third Judicial District, hereby certify that the above and foregoing is a true transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same, to wit: Record upon first appeal by defendant, the City of New Haven; Opinion of the Supreme Court of Errors upon this appeal; Judgment of the Supreme Court of Errors thereon; Record upon the second appeal by The Fair Haven and Westville Railroad Company; Opinion of the Supreme Court of Errors thereon; Judgment of the Supreme Court of Errors thereon; Record upon the third appeal by The Fair Haven and Westville Railroad Company; Opinion of the Supreme Court of Errors thereon; and Judgment of the Supreme Court of Errors thereon.

Witness my hand and the seal of the Supreme Court of Errors of the State of Connecticut, this 21st day of July, A. D. 1905.

[SEAL.] EDWARD A. ANKETELL,
Clerk of the Supreme Court of Errors of the State of Connecticut for the Third Judicial District.

322 Supreme Court of the United States, October Term, 1905.

No. 352.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY, Plaintiff in Error,
vs.
THE CITY OF NEW HAVEN, Defendant in Error.

In Error to the Supreme Court of Errors of the State of Connecticut.

Stipulation as to Printing of Record.

Whereas said cause was three times taken by appeal to the Supreme Court of Errors of the State of Connecticut, and the transcript of record filed with the Clerk of this Court contains the printed record upon each of said three appeals; and

Whereas, the printed record upon the last of said three appeals, viz.: to the third Tuesday of January, A. D. 1905, contains all of the matter contained in the records upon the two appeals previously taken;

Now therefore, it is stipulated and agreed between the parties hereto, that in printing the record herein for use in the Supreme Court of the United States, the records upon the appeals to the Supreme Court of Errors of the State of Connecticut, taken to the

fourth Tuesday of October, A. D. 1902, and to the first Tuesday of June, A. D. 1904, shall be omitted.

323 Dated at New Haven, Connecticut, this 18th day of January, A. D. 1906.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY,
By GEORGE D. WATROUS,
TALCOTT H. RUSSELL, *Counsel.*
THE CITY OF NEW HAVEN,
By LEONARD M. DAGGETT,
JOHN K. BEACH, *Counsel.*

324 [Endorsed:] File No. 19854. Supreme Court U. S. October Term, 1905. Term No. 352. The Fair Haven & Westville R. R. Co., P. E., *vs.* The City of New Haven. Stipulation to omit parts of record in printing. Filed January 26, 1906.

Endorsed on cover: File No. 19,854. Connecticut Supreme Court of Errors. Term No. 352. The Fair Haven and Westville Railroad Company, Plaintiff in Error, *vs.* The City of New Haven. Filed July 24, 1905. File No. 19,854.

FILE COPY.

Office Supreme Court, U.
FILED.
OCT 25 1906
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM 1906.

No. 84.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR

vs.

THE CITY OF NEW HAVEN, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

GEORGE D. WATROUS,
TALCOTT H. RUSSELL,
Counsel for Plaintiff in Error.

The Tuttle, Morehouse & Taylor Co., Law Printers

Supreme Court of the United States.

OCTOBER TERM 1906.

No. 84.

THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR

vs.

THE CITY OF NEW HAVEN, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

STATEMENT OF FACTS.

The record was printed under a stipulation found on page 114 which provides for the omission of certain repetitious matter. The omission of these matters makes it necessary to re-state the substance of the record in order to make the history of the case clear.

This action is an application in the nature of an appeal to the Superior Court of the State of Connecticut from the action of the Court of Common Council of the City of New Haven in assessing against the plaintiff, a street railway corporation, the sum of $36,879. The original application is

found stated upon pages 27 and 37, inclusive, of the Record, and an amendment upon page 39 thereof. Paragraphs 14 and 16 were stricken out by the Superior Court on a motion (see pages 40 and 41 of the Record). The case was then heard in the Superior Court on March 30, 1902, and judgment pronounced reducing the assessment to $5,823.00, as appears by the copy of the judgment set forth upon pages 45 to 47 of the Record. This judgment reducing the assessment was based upon the legal conclusion that the act of the State of Connecticut of 1895, under which the assessment was claimed to be made, was repealed by the act of 1899 (see finding of the Court page 56, paragraph 47, and page 57, paragraph 57), and that therefore the assessment should be made under the rule provided by the Act of 1899 and not under the Act of 1895. The Act of 1895 is found in the Special Laws of the State of Connecticut for 1895, being volume 12 of the publication of Special Acts, on page 565, and is as follows:—

"AUTHORIZING THE CITY OF NEW HAVEN TO ISSUE STREET PAVEMENT BONDS.

Resolved by this Assembly: Section 1. That the court of common council of the city of New Haven be and it is hereby authorized and empowered, by a concurrent vote of a majority of the members of each branch of said court, present and absent, subject to the approval or disapproval of the mayor of said city, as provided in the charter of the city, to issue under the corporate name and seal and upon the credit of the city of New Haven, bonds or other certificates of debt, which bonds shall be denominated Street Pavement Bonds of the City of New Haven; the amount of said pavement bonds issued under this act shall not exceed five hundred thousand dollars, and the same, or the avails thereof, when sold as hereinafter authorized, shall be appropriated by said court of common council to the payment of any expense incurred by said city, in the original construc-

tion in said city of new and so-called permanent pavements; but no portion of said bonds or avails shall be used for any other purpose whatsoever. Any avails of the sale of said bonds may be temporarily borrowed by the city, as provided in section eighty-seven of city ordinances, for the purpose of meeting current expenses of the city; *provided,* said temporary loans shall not in any way interfere with the use of said funds for the purpose of permanent pavements, nor shall any loan be made from said funds for a period of more than four current months. Of the bonds issued at any time by said city one-quarter shall be payable five years from date, one-quarter ten years from date, one-quarter fifteen years from date, and one-quarter twenty years from date. Said bonds shall be prepared, signed and authenticated in such manner as the said court of common council may determine, and they shall bear interest at a rate not exceeding four per centum per annum, payable semi-annually, and may be sold from time to time under the direction of the mayor and board of finance of said city. And said bonds or certificates, when issued as aforesaid, shall be obligatory upon the said city of New Haven to all intents and purposes, and may be enforced and collected in the same manner and to the same extent that debts contracted by municipal corporations in this state are enforced.

Sec. 2. All pavements laid by authority of this act shall be laid upon the credit of said city, and under the direction and control of its common council, and said city shall have power to collect a part of the costs of such pavements from the persons and parties, and in the manner hereinafter provided, to wit: On all streets or parts of streets upon which abutting land owners have never paid the city any assessment for a pavement; such land owners on each side of such streets, or parts of streets, shall be assessed and shall severally pay to the city the cost of one square yard of such pavement as shall be laid for every foot of such abutting land. On all streets or parts of streets upon which abutting land owners have paid to the city assessments for pavements heretofore laid, such land owners on each side of such streets or parts of streets shall be assessed and shall severally pay to the city the cost of three and one-half square feet of such pavement as shall be laid for every front foot of such abutting land, and all public abutting land shall be assessed at the same rate as like private abutting land,

hereinbefore described. On all streets occupied by the track or tracks of any railway company, or companies, said company or companies shall be assessed and shall severally pay to the city the cost of paving and repaving the full length, and nine feet wide for each and every line of track of such railway or railways, now existing, or that may hereafter be laid in any street of said city. All such assessments on the hereinbefore described abutting land owners and railway companies shall be payable at such time or times as may be determined by the court of common council. All the cost of such pavements as may be laid under the provisions of this act, above the costs collectible from the abutting land owners and the railway companies, as hereinbefore provided, shall be paid by the city, which shall have and own all materials removed when old pavements are reconstructed or repaired, and all collections from said abutting land owners, said railways, all the premiums on said bonds, and the proceeds of the sale of such old materials, shall be added to the proceeds of the sale of said bonds to be used exclusively for the construction of said permanent pavements."

The courts of the State of Connecticut take judicial notice of private acts (see Revised Statutes, section 697) and this court will therefore take the same notice.

The act of 1899 is printed in the Record pages 30 and 31, and is as follows:—

"An Act Concerning Permanent Pavements in the City of New Haven.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. The Court of Common Council and the Board of Finance of the city of New Haven shall annually assess upon the grand list one mill on the dollar for the paving of streets, and the receipts from said assessments, and from all other assessments resulting from the construction of street pavements herein provided for, shall only be expended in payment for the original construction of pavements herein enumerated.

Sec. 2. Benefits and damages shall be laid under the control of the court of common council, and assessed by the

bureau of compensation of the city, as provided in the charter of said city, for or against all owners of property abutting upon or adjoining the streets on which such pavements are constructed, which assessment for such benefits shall not exceed per lineal foot of frontage seventy-five cents for dimension granite block pavement, sixty cents for asphalt pavement, fifty cents for vitrified brick pavement, and twenty cents for crushed stone pavement, if said bureau shall find that the property is benefitted to at least that amount; provided, however, that no assessment shall be laid unless the granite block, asphalt, and vitrified brick pavements shall each be provided with not less than four inches in thickness of concrete cement foundation, and that all the pavements named be provided with the vitrified brick gutters.

Sec. 3. An assessment of benefits and damages to be laid for the pavements already constructed and laid in the city of New Haven upon Ashmun, Orange, Trumbull, Wooster and West Chapel streets shall be laid in accordance with and under the provisions of this Act, and the property owners shall be assessed in accordance therewith, irrespective as to whether or not brick gutters have been laid on said streets.

Sec. 4. All pavements laid under authority of this Act shall be laid upon the credit of the city of New Haven, and under the direction of its court of common council; and said assessments shall be collectible and payable, and liens laid to secure the same, at the same time and in the same manner as are the taxes upon the grand list of said city.

Sec. 5. Any party or parties who shall be aggrieved by any assessment laid against them under this Act shall have the right to appeal to the Superior Court therefrom, as provided for in section 87 of the Charter of the City of New Haven, passed by the General Assembly at its January session, 1897.

Sec. 6. This Act shall be regarded as an amendment to the Charter of the City of New Haven, and all Acts or parts of Acts inconsistent herewith are hereby repealed.

Sec. 7. Nothing herein contained shall prevent the city of New Haven from issuing bonds for street pavements in accordance with the power conferred by chapter 389, Special Laws of 1895.

(208) Sec. 8. This Act shall not affect the liability of street railway companies under the general laws."

The defendant appealed from this judgment to the Supreme Court and the plaintiff and appellee filed a bill of exceptions based upon the failure of the court to rule on certain questions concerning the constitutionality of the Act of 1895. This bill of exceptions is found upon pages 73 and 74 of the Record, and was filed in accordance with the provisions of the General Statutes of the State of Connecticut of 1902 by the original plaintiff as appellee under the provisions of section 804 of the revised statutes, which is as follows:—

"*Appellee may file bill of exception when.*—Within five days after the allowance of an appeal, the adverse party may file his bill of exceptions to any decisions of the court in the course of the trial, or in the charge to the jury, which were against him; and if the trial court shall be of opinion that the same questions will arise again if a new trial should be had, such bill of exceptions may be allowed, and the questions arising thereon shall be considered by the supreme court of errors in connection with those presented by the appeal, and the opinion of said court expressed thereon, in case a new trial is advised."

The Supreme Court on appeal at the January term, 1903, reversed the judgment of the Superior Court, ruling that the Act of 1899 did not repeal the Act of 1895 as regards the claim made against the railroad and overruling the bill of exceptions, but remanded the case to the Superior Court with directions to ascertain whether improper items had been included in the assessment (see opinion of the Supreme Court pages 13 to 21, and especially page 21). The case then came again before the Superior Court and the court thereupon rendered judgment for the full amount of $36,879.00, (see judgment pages 76 and 77) and plaintiff thereupon appealed, claiming errors in the judgment of the court (see pages 89 to 90 of the Record).

The court thereupon reversed the action of the Superior Court (see its opinion pages 22 to 26) and ordered that that part of the assessment which included the cost of the guaranty to keep the pavement in repair should be deducted. (See especially pages 23 and 25 of the Record containing the opinion of the court.) Thereupon the case then came before the Superior Court which gave judgment reducing the assessment by the sum of $3,590.85, being the cost of the guaranty to keep the pavement in repair for ten years, and confirmed the assessment as to the balance (see judgment of the Superior Court pages 93 to 94) and the plaintiff again appealed (see Record, pages 104 to 106). And the Supreme Court thereupon rendered judgment confirming the judgment of the Superior Court (see pages 108 to 112); whereupon the plaintiff sued out a writ of error to this court.

The City of New Haven in making the assessment in question proceeded under the provisions of its charter, which are as follows:—

Powers and duties of Bureau of Compensation.

Sec. 82. The Bureau of Compensation shall estimate the total probable expense of taking such land or of making such public improvement, or of discontinuing such highway, or establishing such building line, and shall estimate how much of said amount should be paid by each person whose property is especially benefitted by the proposed measure, and how much should be paid to each person whose property is damaged thereby. All assessments shall be for the excess of benefits over damages, if any, or vice versa, as the case may be. Said bureau shall make a report of its doings to the Department of Public Works, and said department shall report its doings to the Court of Common Council, in writing, and shall annex thereto a survey showing the particular designation of the land to be taken or the layout of the proposed public improvement.

Assessment.

Report to Court of Common Council.

Report.

Sec. 83. Said Court of Common Council may accept said report and adopt such layout or assessments, or may modify the same as it may deem best, and when such report

or modification shall have been accepted and recorded in the records of the Court of Common Council, and when the damages shall have been paid to the person whose property has been taken or damaged for such public purposes, or shall have been deposited with the City Treasurer to be paid to such person when he shall apply for the same, then each of said assessments shall be legally deemed to have been made, and if the matter relate to the taking of land, the land described in the order of said Court of Common Council shall be and remain taken and devoted to the public use for which it shall have been so designed. Such assessment and all sewer assessments shall be published three times in each of two or more daily newspapers published in said city, within one week after such record, and upon the expiration of said week said sum shall be payable. The City Clerk shall, with any such assessment, also publish the descriptive part of the order of the Court of Common Council on which such assessment is based, and the date when the same is payable.

Payment of damages.

Publication

Liens for assessment.

If any person shall refuse to receive the amount found due to him, or in case no one shall be found having authority to receive the sum found due to any particular person, such amount shall be deposited in the treasury of said city, to be paid to the person entitled to receive the same whenever he shall apply therefor. No assessment for benefits shall be collectible nor bear interest until the work for which such assessment was laid shall have been completed. Every such assessment shall bear interest at the rate of six per centum per annum from and after the date of such completion until a certificate of lien therefor shall have been filed.

Construction of sidewalks, etc.

Sec. 84. The Court of Common Council may order the owner or owners of any land fronting on any highway or street in said city to construct or repair sidewalks, curbs or gutters within the highway adjacent to said land, in the manner and within the time specified in such order, at such grade as said city may have constructed in said highway. Notice of such order shall be given by the Board of Compensation to each property owner affected by said order, in the manner prescribed for serving notices of hearings of said board. If any such owner shall neglect or refuse to comply with such order, or to remove snow, ice or sleet from the sidewalk adjacent to his land in the manner required by ordinance, it shall be the duty of the Superintendent of Streets at the expense of the city, to perform the things required by such order or ordinance, and the expenses so incurred shall,

Orders for sidewalks.

Neglect of orders.

from the time when such Superintendent begins to act and make expense in the premises, be and continue a lien and real incumbrance in favor of said city upon such land. Such amount may also be recovered in an action in the name of said city.

Assessment of benefits.

Sec. 85. All assessments of benefits made under this Act shall be and remain a lien upon the property specially benefitted by the public work or improvement in view of which such assessments were made, but the whole amount of assessments for benefits, by reason of any such work or improvement, shall in no case exceed the cost thereof, including the damages payable; and such liens, and liens for the expenses of the laying of any sidewalk, curb or gutter by said city, or for the cleaning of any sidewalk, or for the sprinkling of any street, shall take precedence *and* priority of all other liens or incumbrances on the property whereon the same is imposed (except taxes and other city liens prior in date), and may be foreclosed in the same manner as though said liens were mortgages on such property in favor of said city to secure the amount of such assessment or expenses; provided, that no such lien shall continue to exist longer than sixty days after such assessment shall have become payable, or as the case may be, after such expense shall have been incurred, unless within that period a certificate of lien, in the manner and form elsewhere provided, shall be lodged with the Town Clerk of the Town of New Haven, to be by him recorded in a book kept for that purpose.

Apportionment of assessment.

Sec. 86. In case any land in front of which any sidewalk, curb or gutter is ordered, or against which an assessment of benefits for any public work is to be made, shall be holden by two or more persons jointly, or two or more persons shall have different estates therein, the Board of Compensation may apportion between such persons the amount of such assessment, or the expense of carrying out such order. Said board shall report its doings to the Court of Common Council, and the action of said Court of Common Council thereon shall determine the amount to be paid by the said persons respectively.

To report to Court of Common Council.

And the plaintiff in taking its appeal proceeded under section 87 of that charter, which reads as follows:—

Appeals.

Sec. 87. Any party who shall be aggrieved by any order of Common Council, making any such assessment of benefits

or damages, or requiring the construction of any sidewalk, curb, or gutter, or the payment of any part of the expense thereof, may make written application for relief to the Superior Court, to be held in and for New Haven County; provided, however, that he shall cause a copy of said application to be served upon the City Clerk within thirty days after the doing of the act complained of. Said court may, by a committee or otherwise, inquire into the allegations of such application, and may confirm, annul, or modify the assessment or other action therein complained of, or make such order in the premises as equity may require, and may allow costs to either or neither party at its discretion; and said court may inquire into the validity of all the proceedings upon which said assessment or other action is based. No land taken as aforesaid shall be occupied by the city until the time for taking appeals shall have expired, and until all appeals have been finally disposed of. All such appeals shall be privileged cases in the Superior Court, and it shall be the duty of the Corporation Counsel to cause such appeals to be heard as speedily as possible.

Assessments modified.

Appeals to be privileged.

The plaintiff railroad was incorporated on June 20th, 1860, and section 9 of its charter reads as follows:—

"The Common Council of the City of New Haven may from time to time establish such regulations in regard to said railway as may be required for the paving, grading and sewerage, and the laying of gas and water pipes in and along said streets; and said company in constructing said road shall conform to the grades now existing or hereafter established by said common council of the several streets or avenues traversed by said road. Said company shall keep that portion of the streets and avenues over which their road or way shall be laid down, with a space of two feet on each side of their track or way, in good and sufficient repair, without expense to the city or town of New Haven, or to the owners of land adjoining said track or way."

On July 9th, 1864, it was authorized to construct its road through Chapel Street to Norton Street, which is the location affected by the assessment in question, and section 1 of the amendment to the charter approved July 9th, 1864, author-

izing the construction of the pavement through that street, is as follows:—

"That the Fair Haven & Westville Railroad Company be and hereby is authorized and empowered to lay down its track, with suitable turn-outs, and to run its cars from York Street through Chapel Street westerly to Norton Street, in the city of New Haven; thence through Norton Street to Whalley Avenue in said city; and also, from Whalley Avenue through Howe Street to Chapel Street; the same to be done subject to all the provisions of the ninth section of the original charter of said company."

The above sections quoted from the charter and amendments are the only sections concerning the making of repairs or improvements.

Sections 3837 and 3838 of the revision of 1888, which were in force at the time of the construction of the pavement hereinafter described and the assessment, are as follows:—

3837.

"COMPANY TO REPAIR HIGHWAY. Every such company shall keep so much of the highway as is included within its tracks, and a space of two feet on the outer side of the outer rails thereof in repair, to the satisfaction of the authorities of the city, town, or borough, which is bound by law to maintain such highway. Such authorities shall not order such company to use any better or more expensive kind of pavement or material for that part of the highway which it is the duty of such company to keep in repair, than is used by the town, city, or borough upon the remaining width of the highway, except for a space of one foot on each side of each rail, unless such better or more expensive kind of pavement or material was required in the order permitting the original location of such railway on such highway. Such municipal authorities shall keep a record of all orders as to such repairs, and shall serve a copy thereof upon such company, and every such order shall state the time within which repairs are to be completed, which time shall not be less than thirty days from the service thereof. Upon failure of such

company to make the required repairs within the time fixed by the order, such repairs may be made by the municipal authorities interested, and the expense thereof recovered from the company in an action on this statute.

3838.

DAMAGE FROM DEFECT WHICH COMPANY SHOULD REPAIR. Any person injured in person or property, by reason of any defect in that part of the highway which any street railway company is bound to keep in repair, may bring his action therefor against both such company and the town, city, or borough which is bound to keep such highway in repair, and any judgment recovered in such action shall run against both of such defendants. Such company shall, however, pay such judgment and save the other defendant harmless therefrom, unless the court, or the jury, if the case is tried to the jury, before whom the action is tried, shall find that such defect was due in whole, or in part, to the negligence of such city, town, or borough, in which case the court or the jury shall find and adjudge how much of the judgment shall be paid by the municipality without reimbursement from such company. The fact that such company has kept its part of the highway in repair to the satisfaction of the municipal authorities shall not operate to shift the responsibilities for injuries occurring by reason of defects therein from such company to the municipality."

These are re-enactments of sections 6 and 9 of the Public Acts of 1893, which read as follows:—

"Sec. 6. It shall be the duty of every street railway company to keep so much of the street or highway as is included within its tracks, and a space of two feet on the outer side of the outer rails thereof in repair, to the satisfaction of the authorities of the city, town, or borough which is bound by law to maintain such street or highway. But such authority shall not order said street railway company to use any better or more expensive kind of pavement or material for that part of the street or highway which it is the duty of such railway company to keep in repair, than is used by the city, town, or borough upon the remaining width of the street or highway, except for a space of one foot on each side of each rail, unless such better or more expensive kind of pavement or

material was required in the order permitting the original location and layout of such railway on such street or highway. Every such municipal authority shall keep a record of all orders as to such repairs, shall serve a copy thereof upon the railway company, and such order shall state the time within which repairs are to be completed, which time shall not be less than thirty days from the service thereof; and upon failure upon the part of the company to make the required repairs within the time fixed by the order, such repairs may be made by the municipal authorities interested, and the expense thereof recovered from the railway company in an action upon this statute."

"Sec. 9. Any person injured in person or property by reason of any defect in that part of the street or highway which any street railway company is bound by law to keep in repair, may bring his action therefor against both such company and the town, city or borough which is bound by law to keep said street or highway in repair, and any judgment recovered in such action shall run against both of such defendants. Such railway company shall, however, pay such judgment and save the other defendant harmless therefrom, unless the court, or, if the case is tried to the jury, the jury, before whom the action is tried, shall find that such defect was due in whole, or in part, to the negligence of such city, town or borough, in which case the court or jury, as the case may be, shall find and adjudge how much of the judgment shall be paid by the municipality without reimbursement from the railway company. The fact that the railway company has kept its said part of the street or highway in repair to the satisfaction of the municipal authority shall not operate to shift the responsibility for injuries occurring by reason of defects therein, from the railway company to the municipality."

In 1897, at the time the pavement hereinafter mentioned was completed, the company was operating and is still operating a double track road on West Chapel Street at the locality affected by the assessment. The length of the road affected is 4,852½ feet, and the width of the double tracks with 2 feet on each side thereof is 18 feet; the width of West Chapel

Street itself being from 30 to 35 feet. By an order approved by the mayor of the city of New Haven, approved Oct. 1, 1895, it was ordered that the Board of Public Works cause West Chapel Street to be paved with the best pitch lake asphalt. For the purpose of paying for such pavement and other similar pavements constructed about the same time, an issue of bonds was duly made by the city as authorized by special acts approved July 1, 1895, and the expense of the pavement on West Chapel Street was paid from the proceeds of said bonds (see Record, pages 77 and 78).

On June 4, 1896, a contract was made between the city and the Boston Asphalt Company for the construction of said pavement, a copy of which, marked Exhibit F, is found on pages 57 to 67 of the Record. Section 20 of said contract found on page 62 is as follows:—

"The contractor shall be liable for keeping in repair and good order the whole of the work executed by him for ten (10) years after the date of the final estimate."

The additional expense on account of the guaranty was not separated in the contract, but was subsequently found by the court to be 37 cents per square yard, which in the final judgment was deducted from the original assessment (see section 8 on page 78 and page 94). After the completion of said pavement the fact of its completion and the expense thereof was duly reported by the Director of Public Works, and in February, 1898, an order was made by the court of common council directing assessment for the said pavement and others constructed about the same time, and said order was transmitted to the Bureau of Compensation by the Director of Public Works (see Record, page 79) and said Bureau of Compensation proceeded with said assess-

ment of benefits (see Record, page 79). Said assessment is set out in Exhibits 1, 2 and 3, found on pages 68 and 69.

On or before April 1, 1898, "the Bureau of Compensation inquired of the corporation counsel as to the rule which they should adopt in making the assessment, and whether they could make any exception based upon the degree of benefit received, and were advised by him that the special act of 1895 was mandatory, that the bureau had no discretion, and that they must take the figures of cost, and assess them arbitrarily to the persons and corporations named in the Act, in accordance with frontage or dimensions, by the rule fixed by said Act of 1895, which is the Act found printed in the Special Acts, Vol. XII, page 565 (already recited in this brief). And thereupon said bureau of compensation proceeded to make assessments in accordance with said rule. Many persons appeared, and objected to the assessment in accordance with said rule; but said bureau of compensation announced that it was governed absolutely by said statute, and would hear no evidence in regard to benefits or damages, and proceeded, without reference to, or considering benefits or damages." (See page 79, paragraph 15 of the Record.)

In August, 1898, the Bureau of Compensation rendered a report. The copy of said report is printed in the Record marked Exhibit 2 (see paragraph 16, page 80). Exhibit 2 is found upon pages 68 and 69 of the Record and contained a list of parties assessed, the plaintiff being assessed therein to the amount of $36,879. This report came into the board of aldermen of the city, but as the result of conflicting action the report of the bureau of compensation remained before the common council, consisting of the board of aldermen and board of councilmen of the city, until June 12, 1899, when the matter, after being referred to the proper com-

mittee of the common council, was referred back to the bureau of compensation with directions "for a new assessment of benefits and damages in accordance with the provisions of the new street paving law," being the law of 1899 quoted in this brief, which had then taken effect. (See paragraphs 16 to 26, inclusive, on pages 80 to 81, and Exhibits 2, 3, 4, 5 on pages 68 to 70 of the Record.)

The Bureau of Compensation again asked the opinion of the corporation counsel as to whether the plaintiff could be assessed under the provisions of the Act of 1899, and were advised by him that the plaintiff was an owner of property within the provisions of the Act of 1899 and could be assessed under that Act and under none other (see opinion of the corporation counsel annexed to the complaint, pages 35 to 37).

On February 20, 1900, the bureau of compensation duly held a public hearing concerning the assessments for said pavement, and similar pavements, at which hearing a representative of the plaintiff company appeared, and objected to any assessment against the plaintiff company, claiming that said pavement was a detriment to the business of the railroad company. (See paragraph 27, page 81.)

Said bureau of compensation on March 2d, 1900, duly rendered its report, making assessments for said pavement, which report is made a part of the complaint in this action, and marked therein Exhibit B, by which report the plaintiff company was assessed $5,823 of the cost of said pavement. (See paragraph 28, page 81.) Exhibit B is found printed on pages 31-35 of the Record.

Said report of the bureau of compensation was transmitted in due course to the common council, and came before that body in April, 1900, and thereupon the following motion

was passed: 'Report amended by striking out of the order as reported by the bureau of compensation of the amount specified, namely, $11,581.13, and inserting in lieu thereof the amount $42,537.13, and by further amending said report by striking out the amount of assessment assessed against the Fair Haven and Westville R. R. Company in said report, namely, $5,823, and substituting in lieu thereof the amount $36,879, and the report as so amended accepted, orders passed and assessments laid, as per said report. See paragraph 29, page 81.

The total cost of said pavement as reported by the director of public works was $93,787.49. This included $82,391 paid the Boston Asphalt Company under the terms of its contract set forth in the record, and also certain other items, being the cost of work done by the city in connection with the construction, all of which items are set forth in a schedule, a copy of which is contained in the Record, marked Exhibit 6. (Record, page 81, par. 30.) In the copy of the schedule, Exhibit 6, Record, page 70, are included only such items as relate to the West Chapel Street pavement. Certain of these items, other than the amount paid the contractor, were obtained by apportioning expense incurred on account of the several pavements named to each of such pavements proportionally to the number of square yards of pavement laid. (See Record, page 81.)

The amount assessed against the plaintiff company, $36,879, was obtained by dividing the total cost of the pavement, as shown in Exhibit 6, by the number of square yards laid in West Chapel Street, to obtain the cost per square yard, which was $3.30, and then calculating the cost

at $3.30 per square yard of the pavement in a strip 18 feet in width for the total line of the plaintiff company's track in West Chapel Street. (See paragraph 31, page 81.)

The amount assessed upon the plaintiff company by the bureau of compensation in their report, which is annexed to the complaint, and marked Exhibit B, was obtained by assessing the plaintiff company 60 cents per lineal foot for each line of track in said street. (See paragraph 32, page 81.)

At no time prior to the acts of the boards of aldermen and councilmen and of the mayor of said city, set forth in paragraph 10 of the complaint, p. 20, in relation to said assessment did the plaintiff have any notice of the purpose or intention of either of said boards or the mayor to change the assessment as made by the bureau of compensation in its report which was by said action amended, and the plaintiff was not in fact heard by either of said boards or by the mayor as to such contemplated change or amendment, and no hearing was had by either of said boards or the mayor as to the amount of benefits to the property of the plaintiff by reason of the construction of said asphalt pavement in said West Chapel Street, other than the hearings had before the bureau of compensation and the committee on streets, as hereinbefore set forth. It did not appear in evidence that such increase in the assessment, as set forth in paragraph 10 of the complaint, was made after any consideration of the benefits accruing to the property of the plaintiff by reason of the repaving of said street with asphalt, otherwise than as such consideration appears by the several acts of the boards of aldermen and councilmen and their committees and of the bureau of compensation, as hereinbefore set forth. (See paragraph 33, page 82.)

Before the construction of the pavement in West Chapel Street said street had been paved in part with crushed stone and in part with Belgian blocks. The total cost of that portion of the pavement formerly laid between Howe and York streets was $7,157.07, of which sum there had been assessed in 1873 against the plaintiff company $1,089.27 and against property owners other than the plaintiff company, $3,578.34, and the city had been charged with the balance, namely, $2,489.46. (See paragraph 34, page 82.)

The total cost of that portion of the pavement formerly laid between Howe Street and Sherman Avenue was $18,091.21, of which amount there had been assessed in 1874 against the plaintiff company the sum of $2,755.82, and against property owners other than the plaintiff company $8,176.61, and the balance had been paid by the city, namely, $7,158.83. (See paragraph 35, page 82.)

A sheet asphalt pavement is not in general well suited for use in a street where there is a street railway. In the case of West Chapel Street it was no direct benefit to the plaintiff or its property, but, on the other hand, was a direct damage, inasmuch as it increased the cost of maintaining and operating the railroad in various ways, and in particular by increasing the expense of keeping the pavements in repair between the rails and two feet on each side, and also increased the expense of repairs to the roadbeds, ties, and tracks of the plaintiff. The only benefit to the plaintiff was indirect, and consisted in the tendency of such improvement of a street to increase the population and consequent traffic in that section of the city. No evidence was offered that such benefit exceeds the sum of $5,823. (See paragraph 36, page 82.)

The plaintiff company at all of the times named in this paragraph has not owned or held any property in West

Chapel Street other than the line and lines of track, as hereinbefore set forth, and the wires, poles, and other similar equipment for operating cars thereon by overhead trolley. (See paragraph 37, page 82 of the Record.)

The defendant, appellee herein, in its first appeal from the action of the Superior Court of Connecticut assigned certain errors upon rulings of evidence which it is not necessary to refer to, and made the following claims of law. The claims of law and rulings are found upon pages 53 to 57, paragraphs 38 to 57 of the Record. The reasons of appeal from the first judgment which correspond to assignments of error under the practice of this court are found upon pages 71 to 72 and assert the following among other claims.

1: That the Act of 1895 was not repealed by the Act of 1899 as regards the liability of the plaintiff (see paragraphs 47 and 52, page 56, and assignment 8, paragraph 11, page 72;

That the assessment was valid as an assessment of benefits (see assignment 9, paragraph 48, pages 72 and 56; assignment 12, paragraph 55; assignment 14, paragraph 50; assignment 18, paragraph 56, pp. 72 and 56.)

That the Act of 1895 was a continuation of the obligation to repair and repave, providing only a new method for enforcing the same, and therefore was valid. (See assignment 7, paragraph 46, pp. 72 and 56.)

That the assessment was not invalid by reason of the inclusion of any of the items named in Exhibit 6 (see page 70) and that if any one of said items were wrongfully included the assessment might be corrected accordingly. (See assignment 16, paragraph 53, pages 56 and 72.)

That the assessment was not invalid by reason of including the cost of repair. (See assignment 17, paragraph 54, pages 56 and 72.)

That the assessment if regarded as an act of the police power was valid. (See assignment 15, paragraph 51, pages 56 and 72.)

The Railroad Company appellee therein claimed that, even if the Act of 1895 had not been repealed, its provisions would be unconstitutional as contrary to Section I of the 14th amendment of the Constitution of the United States (see exception 3, page 73) and contrary to Section 10, article I of the United States Constitution (see exception 7, page 73).

That the obligation on the part of the plaintiff to repair did not justify the assessment (see exception 5, 9 and 10, pages 73-74).

That the repavement, if required at all of the railroad, could only be made when found to be the most satisfactory method of repair (see exception 11, page 74).

That the Act of 1895 could not be sustained as an amendment of the plaintiff's charter or an assessment on the franchise (see exception 7 and exception 13, pages 73-4).

That the assessment could not be made arbitrarily without ascertainment of benefits (see exception 6, page 73).

That it was void because it included the cost of obligation to repair, which was not separable from the rest of the assessment (see exception 8, pages 73 to 74).

The opinion of the Supreme Court on the first appeal is found upon pages 13 to 21 of the Record, and decides: 1st, that the Act of 1899 repealed the Act of 1895 only in part; that is, as regards the assessment made against individual land owners and not as regards the assessment against the railroad. (See pages 16 and 18 of the Record.) That as regards the constitutional grounds taken in the plaintiff's bill of exception that they came late in history of legislation;

that the charge against the plaintiff was not an assessment of benefits (see page 18, folio 100).

That this charge was an exercise of the police power (see pages 19 to 20) also that it might be justified as an exercise of the right to repeal or amend the plaintiff's charter (see page 20); and furthermore in reference to the items contained in Exhibit 6, which has been a special subject of discussion, that certain items might have been improperly included and might be deducted. The important part of the opinion on this subject is found upon pages 18 to 21 of the Record, and reads as follows:—

"The plaintiff further objects to the application of the rule of assessment against it provided for in the Act of 1895, upon the ground that the provisions of that act authorizing the defendant to charge against the plaintiff and collect from it the cost of the prescribed portion of any new pavement, if in force, would be unconstitutional and void. This objection comes rather late in the history of legislation of this general character and is, we think, not well founded. Plaintiff-counsel discuss the question chiefly as one involving the assessment of benefits by reason of public improvements. We need not stop to inquire whether the objection in this form is one which would be well taken, since it is quite evident, as we have already had occasion to observe, that the legislation in question did not regard the charge to be imposed upon the plaintiff as one of that character, and since constitutional justification for the legislative attempt to impose upon the plaintiff the burden of a definite portion of the cost of the highway improvement can be otherwise so easily found."

"The establishment, maintenance and regulation of highways is within those powers of the state which are commonly designated as police powers. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650; Jones v. Brim, 165 U. S., 180; Hudson County Ry. Co. v. Hoboken, 41 N. J. L., 71; Goddard, Petitioner, 16 Pick., 504. In the exercise of this power of highway regulation the state may of itself and directly or through its authorized municipal or other agencies decide what repair or improvement public comfort or safety

requires and determine upon whom the burden thereof shall reasonably fall. The power of the state in these matters, as in all others involving the exercise of the police powers, is of course not unrestricted. The regulations must be reasonable and the burden must be reasonably cast. The action must not be arbitrary, oppressive, partial, or unequal. Woodruff v. Catlin, 54 Conn., 295; New York & N. E. R. Co.'s Appeal, 58 Conn., 532; Goddard, Petitioner, 16 Pick., 504; Borough of Greensburg v. Young, 53 Pa. St., 280; North Hudson County R. Co. v. Hoboken, 41 N. J. L., 71; Lawton v. Steele, 152 U. S., 133."

"Within reasonable limits, however, the legislative department is the judge of what the circumstances demand. To this end it is vested with a large discretion and no legislative utterance will be invalidated unless in a clear case. The constitutionality of such legislation will be presumed, and where no reasons are apparent for holding the decision arbitrary, oppressive, partial or unreasonable, the courts will refuse to interfere. Munn v. Illinois, 94 U. S., 113; Lawton v. Steele, 152 U. S., 133; Powell v. Penn., 127 U. S., 678. In this case the legislation and the action under it called for the not unusual proceeding of paving a city street with asphalt. It cast a portion of the attendant burden upon abutting property owners and another portion upon the corporation which enjoyed the exclusive public franchise of operating a street railway in the street to be paved. The extent of the latter burden was limited to the actual cost of the pavement laid upon that portion of the street which was peculiarly appropriated to the special use of the corporation. Here is no such apparent injustice as to warrant us in saying that constitutional powers have been transgressed."

"The constitutional power which upholds this legislation and the municipal action thereunder, is that which has been so frequently appealed to to justify legislative action similar in character whereby the burden of constructing sidewalks, curbs and gutters has been cast upon abutting property owners; Borough of Greensburg v. Young, 53 Pa. St., 280; Paxton v. Sweet, 13 N. J. L., 196; Lowell v. Hadley, 8 Metc., 180; Brusall v. Town of Lebanon, 19 Ohio St., 418; Lewis v. New Britain, 52 Conn., 568; whereby property owners have been required to keep the sidewalks in front of their premises clean and free from snow and ice; Goddard, Petitioner, 16 Pick., 504; Kirby v. Boylston Market Ass'n, 14

Gray, 249; North Hudson County R. Co. v. Hoboken, 41 N. J. L., 71; whereby street railway companies have been compelled to keep their tracks watered. City & Suburban Ry. Co. v. Savannah, 77 Ga., 731."

"That the act required the plaintiff to pay a specific portion of the cost, or rather the cost of a specific portion of the work, and not an amount to be subsequently ascertained or assessed, is no objection to its legality. New York & N. E. R. Co's Appeal, 58 Conn., 532; Doolittle, State's Attorney, v. Branford, 59 Conn., 402. Neither is the fact that the Act did not provide that the plaintiff should first have an opportunity to itself lay the eighteen foot strip of pavement but was required to pay to the city the cost of that construction by the latter. Such is frequently the case as to one at least of the parties where the work is of such a nature as to be best done as an entirety; New York & N. E. R. Co. v. Waterbury, 60 Conn., 1; State's Atty. v. Branford, 59 Conn., 402."

"Again, the plaintiff is a quasi public corporation, having a franchise from the state to operate a street railway in the street in question, among others. Aside from the power impliedly reserved as incidents of the so-called police power, the state has expressly reserved to itself the power to amend, alter, or repeal the plaintiff's charter. This power of amendment is of course not an unlimited one. What its limits are it is perhaps impossible to precisely define; but it is clear that the power extends so far as to authorize legislation imposing reasonable regulations and requirements upon a corporation operating a railway in a public street as to the manner in which the street may be used by it, the precautions to be observed by it for the public safety and welfare, the condition of repair in which the street shall be kept, the improvements which shall be made therein for the convenience of public travel, and the share of any burden incident thereto, which shall be borne by the corporation. The recognized rule upon this subject is well stated in Iceland Fisheries v. Holyoke Water Power Co., 104 Mass., 446. 'It is sufficient now to say that it is established by adjudications which we cannot disregard and the principles of which we fully approve, that it at least reserves to the legislature the authority to make any alteration or amendment in a charter granted subject to it that will not defeat or substantially impair the object of the grant or any rights which

are vested under it and the legislature may deem necessary to secure either that object or other public or private rights.' See Holyoke v. Lyman, 15 Wall., 500; New York, N. E. R. Co. v. Bristol, 151 U. S., 556."

"In Shields v. Ohio, 95 U. S., 319, the court has this to say concerning the limitations and the exercise of this reserve power: 'The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith and be consistent with the scope and object of the Act of Incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property or corporations in such cases are surrounded by the same sanctions and are as inviolable as in other cases.'"

"The court in Traction Co. v. Elizabeth, 58 N. J. L., 619, states the practical and legal situation very pertinently as follows: 'A street railway company used as its road bed public streets provided and improved at public expense and acquired and held for the benefit and advantage of the public at large. . . . The legislature in authorizing a street railway company to make use of the public streets, intended that the grantee of this privilege should be subject to municipal regulation of a greater scope than would be allowable in the case of companies occupying and using their own road bed. . . . These companies hold their franchises subject to such municipal regulations as do not unreasonably or unnecessarily interfere with the exercise of the franchises conferred by the legislature.'"

"These principles have their substantial approval in the cases of New Haven & H. R. Co. v. Waterbury, 32 Conn., 240."

"The Act of 1895 was in effect an amendment to the plaintiff's charter. Bulkley v. New York & N. H. R. Co., 27 Conn., 479; New York & N. E. R. Co. v. Waterbury, 60 Conn., 1."

"Plainly what was required of the plaintiff by the amendment was well within the rule stated and without its limitations."

"Incidental objections are made by the plaintiff and discussed in the briefs of counsel, to the assessment made by the city, to wit: (1) That it was without due notice to the plaintiff, and (2) that it included items of expense not involved in the cost of paving the eighteen feet of width chargeable to the plaintiff. The first is not well taken, since the plaintiff was duly notified of the inception of the assess-

ment proceedings before the city officials, which proceedings from their beginning to their conclusion, in legal contemplation, formed one continuous proceeding, and at a later stage became a party to them. Gilbert v. New Haven, 39 Conn., 467. With respect to the second, it is sufficient to observe that while it is quite possibly true that the city may have included improper items of charge, its claim is not tied to the precise amount of its figures, which it will become the duty of the court below to revise and correct as the facts may require when it comes to apply the proper rule for the determination of the plaintiff's liability."

"There is error and the cause is remanded to be proceeded with according to law."

The court thereby in substance ruled that the Act of 1895 was in part an exercise of the power of special assessment; that is, as regards the individuals concerned, and in part an exercise of the police power as regards the railroad. That as regards that part of the act which was an exercise of the taxing powers, or power to make special assessment, it was repealed by the Act of 1899. That as regards the police power affecting the railroad it was not repealed.

The case thereupon again came before the Superior Court for consideration, and the court thereupon adjudged that the whole amount of the assessment, to wit: $36,879, was valid and rendered judgment in favor of the defendant (see Record, pages 76 and 77), and the plaintiff thereupon appealed, making claims and assignments of error substantially as made in his bill of exceptions on the previous appeal, but further amplified and particularized (see Record, pages 83 to 90).

The opinion of the Supreme Court of Connecticut on this second appeal is found on pages 22 to 25 of the Record. That court reversed the decision of the Superior Court and again sent the case down for the deduction of the cost of repair. It states that the claim that this could not be made a basis of assessment against the railroad is a new one not made before, which, in view of paragraph 8 of the bill of

exceptions on the previous appeal, page 74, which reads as follows:—

"The plaintiff asked the Court to rule that as the assessment appealed from included not only the cost of the pavement but the cost of keeping the same in repair for ten years, and as those items were not separable, the whole assessment was void."

And of paragraph 54, page 56 and assignment of error 17, page 72, which refers to that paragraph, would seem to be an oversight on the part of the judge of the Supreme Court who rendered the opinion. The court also states that certain other claims advanced are new to the case, and in that connection uses the following language (see Record, page 25):

"Other claims new to the case are made, to the general effect that as the street had been paved twenty-three years before and the plaintiff had been assessed a portion of the cost thereof and especially as the city had not shown the need of the new pavement as a means of repair, an unconstitutional use of the Act would result if the present charge against the plaintiff was enforced. These claims have no foundation either in the application or pleadings and therefore have no standing in the case. We do not hesitate to say, however, without discussion, that in view of the pleadings, which did not put the plaintiff to the proof of the necessity of the new work as a means of repair and proper maintenance of the street, the facts indicated could not be held sufficient to accomplish the results claimed for them."

We submit that that would also seem to be the result of an oversight.

See bill of exceptions in the final appeal, Record, p. 74, par. 11, which reads as follows: "The plaintiff claimed that the repavement if required at all could only be required when it was found to be unsatisfactory or the most satisfactory method of repair, which did not appear in this case."

The case thereupon came again before the Superior Court, which rendered judgment which appears on pages 93 and

94, deducting the cost of repair and establishing the assessment for the balance, making its finding including the claims of law made by the plaintiff found upon pages 96 to 102, from which the plaintiff appealed, as appears by pages 104 to 105. And thereupon the Supreme Court again rendered its decision in favor of the defendant, the opinion being found upon pages 108 to 112, to which judgment this writ of error has been sued out.

The Supreme Court in its final opinion ruled as follows:—

"(1) That the only section of the Act of 1899 which did not relate to future paving construction, to wit, section 3, was not intended to, and did not relate to the ascertainment of the share of the cost of street paving completed prior to the passage of the act which might be cast upon a street railway company occupying with its tracks the paved street, and was not intended to, and did not, operate to repeal, change or modify the provisions upon that subject of the act of 1895 which was in force when the work was done.

(2) That the act of 1895 furnished the only rule prescribed by the statute for the ascertainment of the share of the burden of the cost of the pavement construction in question which the city might impose upon the plaintiff, and that the imposition of the share so ascertained was in terms authorized by said act.

(3) That the said provisions of the act of 1895, which, in terms, were that 'on all streets occupied by the track, or tracks of any railway company or companies, said company or companies shall be assessed and shall severally pay to the city the cost of paving and repaving the full length and nine feet wide for each and every line of track," etc., were not intended to provide a rule for the assessment of benefits accruing to property owners by reason of a public work, nor to provide a basis for taxation, but to prescribe a measure of the burden which the plaintiff, as a quasi public corporation, enjoying at the hands of the state, and for its own benefit and advantage, certain special privileges in the highway and in the roadbed thereof, ought reasonably to bear with respect to the maintenance of that highway.

(4) That the said provisions of said act were not such that we could say of them that they required of the plaintiff, as a corporation operating under public authority a railway

in a public street, anything that was unreasonable; that the burden thereby imposed was unreasonably cast; or that the burden was in any respect arbitrary, oppressive, partial, or unequal.

(5) That said provisions of said act, interpreted as indicated in paragraph 3, above, and being of the character indicated in paragraph 4, were within the power of the General Assembly to enact, and were not violative of any constitutional prohibition of this state or of the United States, since they embodied a valid exercise of both what is commonly termed the 'police power' and the reserved power of amendment of the plaintiff's charter, by and under which its franchise in the highway was derived and is enjoyed.

(6) That those features of the act which required the plaintiff to pay the cost of a specified portion of the work done, gave the plaintiff no opportunity to itself do the work, permitted the city to do it, and required the plaintiff to pay the city the cost, were not such as were forbidden by fundamental law.

(7) That the objection urged in the bill of exceptions to the amount of the city's assessment, to wit, that it included items of expense not involved in the cost of paving the 18 feet of width chargeable under the act to the plaintiff, did not call for decision, since the correctness of that assessment was not then in question, and the considerations urged were properly to be addressed to the trial court upon the remandment of the cause for a new assessment as ordered.

Error was thereupon found, and the cause remanded.

Upon the rehearing to determine the amount which should be assessed under the provisions of said act of 1895, the Superior Court confirmed the city's assessment of $36,879. The plaintiff thereupon appealed, assigning as error not only those rulings which the court made pursuant to the former decision of this court, but also others which were either not presented upon the former appeal, or not then passed upon. Upon that appeal we reaffirmed, without discussion, our former rulings, and further held:—

(8) That the assessment thus confirmed included not only the cost of paving that portion of the street specified in the statute, but also the cost of keeping the same in repair for a period of years, and was therefore, and to that extent, unwarranted and improper.

(9) That the said cost of repair was not, either inherently or upon the facts disclosed by this case, so incapable of separation from the cost of construction that the latter could not

be ascertained, and an award therefor made, as the statute requires.

(10) That the claim then for the first time made, that the assessment laid was neither in whole or in part invalid, as being the result of an unlawful and unconstitutional exercise of the power conferred by the terms of the act of 1895, since the street had been paved, in whole or in part, 23 years prior to the laying of the present pavement, and that the plaintiff had then been assessed and had paid a portion of the cost thereof, and especially since the city had failed to show the propriety or necessity of the new pavement as a means of repair, was one of which the plaintiff could not take advantage, for the reason that neither the original application, nor any subsequent pleadings in amendment to or supplement of it, furnished any foundation for it, and for the further reason that as the plaintiff had not given any notice of an intention to make the claim, and by such notice put the city to the proof of facts to meet it, the latter's failure to make such proof could not, in fairness, be used to its disadvantage, in a way of which no warning had been given.

* * * * *

The plaintiff, in its brief, asks us to define more clearly than was done in our last opinion the claims which come within the ruling then made as hereinbefore stated in paragraph 10 of the resumé of our rulings. If any more precise statement could be deemed necessary, we would say that we intended to include any claim that the assessment, if confirmed, would, under the circumstances of the present case, be, either in whole or in part, the result of an unlawful and unconstitutional exercise of the legislative power, for the reason or reasons that the whole of a portion of said street had once been paved, the plaintiff being assessed and paying a part of the cost thereof; that the defendant had not shown the propriety or need of the repavement as a measure of repair; that it had not shown that some proper public authority had passed upon that question, or other reasons peculiar to this particular work, and not arising from the general operation of the statute."

It will be seen from the above statement that the so-called assessment in question was claimed by the City to be valid—first, as a special assessment of benefits; second, as a franchise tax; third, as an amendment to the charter; fourth,

as an exercise of police power, and fifth, as a mere change of the form of the obligation to repair contained in the charter and the general laws of the state. All these claims except the claim that it was justified as an amendment of the charter and as an exercise of the police power were disregarded by the court. The assignments of error in this court are as follows:—

First, the police power; the assignments affecting this are Nos. 13 to 21 inclusive. Second, the power of amendment. The assignments affecting this are Nos. 22, 23 and 24 and a, b, c, d, e, f and g thereunder. The railroad claims that the Act of 1895 and the assessment thereunder impaired the obligation of contracts with it and therefore was in violation of Article 14 of the amendment to the Constitution of the United States, Section 10, Article 1. The assignments bearing upon this question are Nos. 10, 11, 28 and 29. The other assignments may be classified as follows:—

Franchise tax, Nos. 25 and 26.

That the Act of 1895 and the assessment thereunder are mere changes of form of the obligation to repair, No. 27.

That they are an exercise of the power of special assessment under the taxing power, Nos. First, 2, 3, 4, 5, 6, 7, 8 and 9.

Because the court erred in overruling the claim of the plaintiff in error that said assessment of $36,879 was void and in violation of Article 14 of the Amendments to the Constitution of the United States, as depriving the plaintiff of property without due process of law, and denying to the plaintiff the equal protection of the laws.

1. Because the assessment of $36,879 was made without any inquiry or finding of benefit to the railroad;

2. Because the law under which said assessment was made does not call for any inquiry or finding and is wholly arbitrary.

3. Because as a matter of fact there is no benefit whatsoever to the road;

4. Because the indirect benefit consisting in the tendency of the pavement to increase the population and consequent traffic in that section of the city is not such a benefit as will sustain an assessment.

5. Because said assessment includes the cost of keeping said pavement in repair and said amount is not separated or separable from the general assessment, and because said cost of repair cannot be made a legal basis of assessment against the railroad but should be paid from general taxation;

6. Because plaintiff is assessed and compelled to pay from general taxation its proportion of the expense of the paving of said street, and, if subjected to this assessment, is compelled to pay twice for the same thing.

7. Because the plaintiff is bound under its charter and the laws of the state to keep the space between the rails and for two feet on each side in repair, which obligation stands unrepealed, and the plaintiff could not be legally subjected to an assessment for the expense of doing that which it is still bound to do itself.

8. Because it appears from the finding that over the whole of its route on West Chapel Street at least one line of track was in use at the time said street was paved in 1873 or 1874, and said company has been assessed therefor, and because said company cannot again be compelled to pay the cost of paving the space between and for two feet outside of said single line of track, as its obligation thereto is to keep the same in repair only.

9. Because said assessment should be reduced by the cost of constructing the asphalt pavement, in so far as the same relates to its track as laid prior to the passage of the order for such asphalt pavement, inasmuch as it appears that from Howe Street to York Street a single line of track was then

in use, and a double track for the greater portion of the distance between Howe Street and Sherman Avenue, and a single track for the remaining distance of its route on Chapel Street. Neither the charter, nor the general law, nor any contract between the company and the city or state, requires paving or repaving any portion of the street for the paving of which it has been assessed.

10. Because the Act of 1895, so far as it authorized this assessment against the plaintiff, is void, because it impairs the obligation of the contract with the plaintiff contained in its original charter, Private Acts of 1860, page 370, which provides that said company shall keep that portion of the streets and avenues through which said road or way shall be laid down, with a space of two feet on each side of their track or way, in good and sufficient repair, without expense to the city or town of New Haven, or the owners of land adjoining said track or way, and said act is therefore in violation of Section 10 of Article 1 of the Constitution of the United States;

11. Because said Act of 1895, so far as it authorizes said assessment against the plaintiff, is in violation of the contract contained in the amendment to the charter of the Fair Haven & Westville Railroad Company, Private Acts of 1864, page 655, by which it was authorized and empowered to lay and operate its tracks, over the portion of Chapel Street affected by the said assessment, subject to the provision of the 9th section of the original charter of said company. Said act, so far as it authorized said assessment, is in violation of the Tenth Section of Article 1 of the Constitution of the United States;

12. Because neither the 9th section of the original charter of the company, nor the amendments, nor the Act of 1895, section 6 requires the plaintiff to pave or repave any portion of the streets, and the Act of 1895 cannot be supported as a change in the form of the obligation.

13. Because the portion of section 9 of the charter of the company, which reads as follows: "The Common Council of

the City of New Haven may from time to time establish such regulations in regard to said railroad as may be required for the paving, grading, sewerage and the laying of gas and water pipes in and along said streets," does not give to the city any power to order pavement or the payment of the expense of pavement by the road, but means simply that the railroad shall comply with such rules and regulations as will enable the city to complete its operations of paving, grading, sewerage, and the laying of gas and water pipes;

14. Because no general statute nor law of this state authorizes any such assessment or the imposition of any pecuniary burden, except when such company has failed and, after order, refused to keep such portion of the street in good and sufficient repair;

15. Because said Act of 1895, so far as it affects the railroad, is not a police regulation. It does not on its face bear any evidence of being such, or to have been governed or dictated by considerations appropriate to a police measure, but, on the contrary, purports to be, and is, a simple revenue measure.

16. Because there is no necessity for such an act to enforce any legitimate police regulation. The provision of the charter of the plaintiff and the Act of 1893 require the company to repair and keep the road in good condition. Such a charge could not be justified under the police power, even if the act were so intended, and there was nothing to justify or necessitate such a requirement of the railroad;

17. Because the Special Act approved July 1, 1895, is not a general law imposing a police regulation to protect the public health, morals or safety, nor is it a condition lawfully imposed upon the exercise of the franchise conferred upon the plaintiff, but impairs the obligation of the contract between the state of Connecticut and the plaintiff as contained in the plaintiff's charter and amendments, and is therefore unconstitutional and in violation of Section 10 of Article 1 of the Constitution of the United States.

18. Because the Special Act approved July 1, 1895, is not

a valid exercise of the police power reserved to the state of Connecticut, in that it arbitrarily imposes a pecuniary burden upon the applicant, and is not passed to protect the health, morals or safety of the community, and said special act is therefore unconstitutional and void, in that it deprives the applicant of its property without due process of law, and denies it the equal protection of the laws, contrary to the provisions of Amendment XIV of the Constitution of the United States, and deprives the plaintiff of its property without just compensation, contrary to Section 2 of Article 1 of the Constitution of the State of Connecticut.

19. Because the assessment appealed from purports to be, and if of any effect is, an assessment for special benefits to the property of the plaintiff, but if not, it constitutes a statutory obligation to pay money, which cannot be sustained without proof that a payment of this character was, under the circumstances, necessary to protect the public against an unsafe condition of West Chapel Street caused by the presence of applicant's tracks or to operations of its railroad, the burden of proof being on the city;

20. Because an order to a street railway corporation to pay the cost of a pavement which is a direct damage to the corporation cannot be sustained without proof that the track of said company constitutes a nuisance in the highway and that such an order was reasonable and necessary in order to compel the company to respond to its charter and statutory obligations to keep 18 feet of West Chapel Street in repair;

21. Because an act or resolution requiring any individual or corporation to pay a portion of the expense of any public work, or a portion of the expense required to carry on the government of a municipality, or of discharging its ordinary police duties, besides what it is compelled to pay by the general taxation laws, cannot be sustained unless it appear that there is a direct and special benefit to said individual or corporation, or unless it appear that said expenditure is necessary in order to obviate some nuisance or inconvenience for which said corporation or individual is responsible. The plaintiff

in this case is not so benefited, nor is the expenditure for which it is assessed in any way necessary to the prevention or removal of any nuisance or inconvenience for which the plaintiff is responsible. Said assessment, therefore and the Act of 1905, so far as it authorizes said assessment, are void and illegal, and take the property of the plaintiff without due process of law and without compensation, and deny to the plaintiff the equal protection of the laws, contrary to the 14th Amendment of the Constitution of the United States.

22. Because said Act of 1895, so far as it affects the railroad company, does not purport to be an amendment to the charter of the railroad company and cannot be supported as such;

23. Because said Act of 1895, if purporting to be an amendment to the charter, would not be valid, and is an attempt to affect the property rights of the plaintiff without due process of law, and as such cannot be justified under the power of amendment;

24. Because the special act approved July 1, 1895, entitled "An Act Authorizing the City of New Haven to Issue Street Pavement Bonds," cannot be deemed to be an amendment of the applicant's charter for the following reasons:—

(a) Because it purports to affect the charter of the City of New Haven only.

(b) The applicant is not named in said act otherwise than by reference in the phrase "on all streets occupied by the track or tracks of any railroad company or companies," etc.

(c) Said act is not a general statute but a special law.

(d) It is not in name or effect a police regulation for the health or safety of the public.

(e) It is an act special in its character, and imposing a pecuniary burden upon such of the railways of the state only as are within the City of New Haven.

(f) It does not appear that said so-called amendment was accepted by the stockholders of the applicant within six months after its passage, or that it is otherwise specially provided in said private act.

(g) It does not appear that the applicant appeared or was cited to appear before the General Assembly of 1895 with respect to an amendment to its charter in the manner imposed in said private act.

25. Because said Act of 1895, so far as it affects the railroad, cannot be supported as a franchise tax. It does not purport to be such, nor is it general in its nature, but lays special burdens upon individual corporations.

26. Because said Act of 1895, if considered as a franchise tax, and the assessment thereunder, are void, because they assume to deprive the plaintiff of the benefit of the contract contained in its charter.

27. Because said obligation, if any, imposed upon the applicant under the special act approved July 1, 1895, does not include the right to require the applicant to repave the space between the tracks and two feet on the outer side of the outer rails, when the greater portion of such space is already paved and the applicant has already been assessed therefor;

28. The Act of 1895, so far as it purports to authorize the city to impose upon the railroad the cost of paving the space between the rails and two feet on either side, is for the reasons specified in the claims herein above mentioned, in violation of Article XIV of the Amendments of the Constitution of the United States and Section 10 of Article 1 of said Constitution, because it deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws.

29. Because the court erred in overruling the claim of the plaintiff in error that said Act of 1895 was, so far as it purported to authorize the city to impose upon the railroad the cost of paving the space between the rails and two feet on either side, for the reasons specified in the claims herein mentioned, in violation of Article XIV of the Amendments of the Constitution, because it impairs the obligation of the contract with the plaintiff and because it deprives the plaintiff

of its property without due process of law and denies to the plaintiff the equal protection of the laws.

Because the court erred in overruling the claims of the plaintiff in error that said Act of 1895 was, so far as it purported to authorize the city to impose upon the railroad the cost of paving the space between the rails and two feet on either side, for each of the reasons hereinafter specified, in violation of Article XIV of the Amendments of the Constitution of the United States, Section 10, and Article 1 of said Constitution, because it impairs the obligation of the contract with the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws.

(a) Because the law under which said assessment was made does not call for any inquiry or finding and is wholly arbitrary.

(b) Because, as a matter of fact, there is no benefit whatsoever to the road.

(c) Because the indirect benefit consisting in the tendency of the pavement to increase the population and consequent traffic in that section of the city is not such a benefit as will sustain an assessment.

(d) Because plaintiff is assessed and compelled to pay from general taxation its proportion of the expense of the paving of said street, and if subjected to this assessment, is compelled to pay twice for the same thing.

(e) Because it appears from the finding that over the whole of its route on West Chapel Street at least one line of track was in use at the time said street was paved in 1873 or 1874, and said company has been assessed therefor, and because said company cannot again be compelled to pay the cost of paving the space between and for two feet outside of said single line of track, as its obligation thereto is to keep the same in repair only.

(f) Because said assessment should be reduced by the cost of constructing the asphalt pavement, in so far as the same relates to its track as laid prior to the passage of the order

for such asphalt pavement, inasmuch as it appears that from Howe Street to York Street a single line of track was then in use, and a double track for the greater portion of the distance between Howe Street and Sherman Avenue, and a single track for the remaining distance of its route on Chapel Street. Neither the charter, nor the general law, nor any contract between the company and the city or state, requires paving or repaving any portion of the street for the paving of which it has been assessed.

(g) Because the Act of 1895, so far as it authorized this assessment against the plaintiff, is void, because it impairs the obligation of the contract with the plaintiff contained in its original charter, Private Acts of 1860, page 370, which provided that said company shall keep that portion of the streets and avenues through which said road or way shall be laid down, with a space of two feet on each side of their track or way, in good and sufficient repair, without expense to the city or town of New Haven, or the owners of land adjoining said track or way, and said act is therefore in violation of Section 10 of Article 1 of the Constitution of the United States.

(h) Because said Act of 1895, so far as it authorizes said assessment against the plaintiff, is in violation of the contract contained in the amendment to the charter of the Fair Haven & Westville Railroad Company, Private Acts of 1864, page 655, by which it was authorized and empowered to lay and operate its tracks over the portion of Chapel Street affected by said assessment, subject to the provisions of the 9th section of the original charter of said company. Said act, so far as it authorized said assessment, is in violation of the tenth section of Article 1 of the Constitution of the United States.

(i) Because neither the ninth section of the original charter of the company, nor the amendment, nor the Act of 1895, section 6, requires the plaintiff to pave or repave any portion of the streets, and the Act of 1895 cannot be supported as a change in the form of the obligation.

(j) Because no general statute nor law of this state authorizes any such assessment or the imposition of any pecuniary burden, except when such company has failed and, after order, refused to keep such portion of the street in good and sufficient repair.

(k) Because said Act of 1895, so far as it affects the railroad, is not a police regulation. It does not on its face bear any evidence of being such, or to have been governed or dictated by considerations appropriate to a police measure, but, on the contrary, purports to be, and is, a simple revenue measure.

(l) Because there is no necessity for such an act to enforce any legitimate police regulation. The provision of the charter of the plaintiff and the Act of 1893 require the company to repair and keep the road in good condition. Such a charge could not be justified under the police power, even if the act were so intended, and there was nothing to justify or necessitate such a requirement of the railroad.

(m) Because the special act approved July 1, 1895, is not a general law imposing a police regulation to protect the public health, morals or safety, nor is a condition lawfully imposed upon the exercise of the franchise conferred upon the plaintiff, but impairs the obligation of the contract between the state of Connecticut and the plaintiff as contained in the plaintiff's charter and amendments, and is therefore unconstitutional and in violation of Section 10 of Article 1 of the Constitution of the United States.

(n) Because the special act approved July 1, 1895, is not a valid exercise of the police power reserved to the state of Connecticut, in that it arbitrarily imposes a pecuniary burden upon the applicant, and is not passed to protect the health, morals, or safety of the community, and said special act is therefore unconstitutional and void in that it deprives the applicant of its property without due process of law, and denies it the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, and deprives the plaintiff of its property

without just compensation, contrary to Section 2 of Article 1 of the Constitution of the State of Connecticut.

(o) Because the assessment appealed from purports to be, and if of any effect is, an assessment for special benefits to the property of the plaintiff, but if not, it constitutes a statutory obligation to pay money, which cannot be sustained without proof that a pavement of this character was, under the circumstances, necessary to protect the public against an unsafe condition of West Chapel Street caused by the presence of applicant's tracks or to operations of its railroad, the burden of proof being on the city.

(p) Because an order to a street railway corporation to pay the cost of a pavement which is a direct damage to the corporation cannot be sustained without proof that the track of said company constitutes a nuisance in the highway and that such an order was reasonable and necessary in order to compel the company to respond to its charter and statutory obligations to keep 18 feet of the street in order.

(q) Because an act or resolution requiring any individual or corporation to pay a portion of the expense of any public work, or a portion of the expense required to carry on the government of a municipality, or of discharging its ordinary police duties, besides what it is compelled to pay by the general taxation laws, cannot be sustained unless it appear that there is a direct and special benefit to said individual or corporation, or unless it appear that said expenditure is necessary in order to obviate some nuisance or inconvenience for which said corporation or individual is responsible. The plaintiff in this case is not so benefited, nor is the expenditure for which it is assessed in any way necessary to the prevention or removal of any nuisance or inconvenience for which the plaintiff is responsible. Said assessment, therefore, and the Act of 1895, so far as it authorizes said assessment, are void and illegal, and take the property of the plaintiff without due process of law and without compensation, and deny to the plaintiff the equal protection of the laws, contrary to the 14th Amendment of the Constitution of the United States.

(r) Because said Act of 1895, so far as it affects the railroad company, does not purport to be an amendment to the charter of the railroad company and cannot be supported as such.

(s) Because said Act of 1895, if purporting to be an amendment to the charter, would not be valid, and is an attempt to affect the property rights of the plaintiff without due process of law, and as such cannot be justified under the power of amendment.

(t) Because the special act approved July 1, 1895, entitled "An Act Authorizing the City of New Haven to Issue Street Pavement Bonds," cannot be deemed to be an amendment of the plaintiff's charter, for the following reasons:—

(1) Because it purports to affect the charter of the City of New Haven only.

(2) The applicant is not named in said act otherwise than by reference in the phrase "on all streets occupied by the track or tracks of any railroad company or companies," etc.

(3) Said act is not a general statute but a special law.

(4) It is not in name or effect a police regulation for the health or safety of the public.

(5) It is an act special in its character, and imposing a pecuniary burden upon such of the railways of the state only as are within the city of New Haven.

(6) It does not appear that said so-called amendment was accepted by the stockholders of the applicant within six months after its passage, or that it is otherwise specially provided in said private act.

(7) It does not appear that the applicant appeared or was cited to appear before the General Assembly of 1895 with respect to an amendment to its charter in the manner imposed in said private act.

(u) Because said Act of 1895, so far as it affects the railroad, cannot be supported as a franchise tax. It does not purport to be such, nor is it general in its nature, but lays special burdens upon individual corporations.

(v) Because said Act of 1895, if considered as a franchise

tax, and the assessment thereunder, are void, because they assume to deprive the plaintiff of the benefit of the contract contained in its charter."

It will be observed that these assignments of error question the validity of the assessment as being contrary to the 14th Amendment of the Constitution of the United States and of the 10th section of Article 1 of the Constitution.

POINT I.

The act of 1895 so far as affects the plaintiff cannot be sustained as an exercise of the police power.

A.

It is not in fact an exercise of the police power, but an attempt to exercise the revenue power. This claim is set out clearly in assignment 15, page 5 of the Record, which is as follows:—

"Because said act of 1895, so far as it affects the Railroad, is not a police regulation. It does not on its face bear any evidence of being such, or to have been governed or dictated by considerations appropriate to a police measure, but, on the contrary, purports to be, and is, a simple revenue measure."

The police power is defined by Judge Cooley in his book on Constitutional Limitations, 6th edition, page 704, as follows:—

> "The police of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

The same author in his book on Taxes, 2d edition, page 1, defines taxes as follows:

> "Taxes are the enforced proportional contributions from persons and property levied by the state by virtue of its sovereignty for the support of the government and for all public needs."

Freund on the Police Power, section 3, page 3, well states the law in the following language:—

> "The term 'police power'—It has been inferred from this vagueness of the term police, that the idea of the police power must be equally undefined, and a recent author has gone so far as to deny its existence, treating it as a fiction, and holding it equivalent to indefinite supremacy. The inference is, however, unwarranted. As soon as the idea of the police became the center and foundation of a governmental power, the exercise of which had to justify itself in the face of constitutional limitations, the courts were bound to use the term with greater care, and to attempt to define it. From the mass of decisions, in which the nature of the power has been discussed, and its application either conceded or denied, it is possible to evolve at least two main attributes or characteristics which differentiate the police power; it aims directly to secure and promote the public welfare, and it does so by restraint and compulsion. It will be necessary to offer a few general observations upon these two points, bearing in mind that it is not by general statements, but only by a detailed examination of statutes and decisions that the power can be fully understood and defined. Such an examination will show what has been done and what has been approved by experience, what has been attempted and has failed, what has been surrendered, and what is aimed at and in process of being accomplished. It will reveal the police power not as a fixed quantity, but as the expression of social, economic and political conditions. As long as these conditions vary, the police power must continue to be elastic, i. e., capable of development."

> "Only those cases where regulation is the primary purpose can be specifically referred to the police power." (See Dillon on Taxation, edition 1886, page 587.)

Judge Adams in the Rochester Turnpike Road Co. v. Joel, 41 N. Y., App. Div. 43, speaking of the regulation under the police power of the conduct of corporations, says:—

> "The limit to the exercise of the police power in these cases must be this: the regulations must have reference to the comfort, safety and welfare of society; they must not be in conflict with any of the provisions of the charter and they must not, under pretense of regulation, take from the corporation any essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchises."
>
> Cooley, Constitutional Limitations (4th ed.), 719,
>
> Potter's Dwarris on Statutes, 458.

The taxing power is the power to levy such proportional contributions. The taxing power is a means to enable the state to exercise the police power, but is a separate and distinct power from the police power. The Act of 1895 was an exercise of the second class of powers and not of the first.

The act is entitled "Authorizing the City of New Haven to Issue Street Pavement Bonds." The very title indicates that the act concerns itself with means of raising revenue for the exercise of the governmental power of the city. By section 2 it is provided that "such pavements shall be laid upon the credit of the city," that it may then collect the cost of such pavement from abutting proprietors in accordance with a fixed rule known as the front foot rule, and from

the railroads in accordance with another fixed rule, that is, the width of the tracks and 2 feet on each side. The language used in reference to the abutting owners, "shall be assessed and shall severally pay," is used in reference to railroads, "shall be assessed and shall severally pay." This language is universally known as appropriate to taxation, either general taxation or that branch of taxation known as special assessment, and is never used in connection with the police power, which either enjoins or forbids particular actions absolutely or establishes conditions with reference to such action.

Whether the railroad paid these assessments or not did not affect in any way the object sought by the police power as defined by Judge Cooley. The act is plainly an example of that class of acts by which it has been attempted to exercise the power of special assessment by fixed rules in order to avoid inquiry in reference to the benefits in each case; the same class of acts which have repeatedly come before this court, and particularly in the case of Norwood v. Baker, 172 U. S., 269. (See also Dillon on Municipal Corporations, section 752.)

The objects of said act were the same whether the class of persons affected were owners of abutting property or railroads, that is to raise revenue.

It is admitted and ruled by the court that as regards the adjoining proprietors the Act of 1895 is an exercise of the power of special assessment, a branch of the taxing power. (See Opinion of the Court, Record, page 17.)

The legislature, in the same act, uses the same language concerning the street railroads. Obviously it had the same object and the same consideration in view in the one case as in the other, i. e., the raising of revenue.

The facts set forth in the finding show that the contemporary construction of the Act of 1895 by all persons interested was that it was an attempt to exercise that portion of the taxing power known as special assessment. The matter was treated in the ordinary way adapted for such cases. It was referred to the bureau of compensation, which was the board which has in charge the assessment of benefits and damages. The notice to the plaintiff is found upon page 68 of the Record, Exhibit I, and gives notice that "the amount of the proposed assessment for benefits against you is $36,879," and Exhibit 2 on the same page, containing the report of the bureau of compensation, uses the following words: "The bureau of compensation, to whom was referred the cost of a pavement in Chapel Street, from York Street to the Boulevard, for the assessment of benefits and the apportionment of the cost of said pavement among the parties interested therein, respectfully report that they have attended to the duty assigned them," and then follows a statement of the amount assessed against the plaintiff, the list of amounts assessed against the plaintiff being prefaced by the following words: "The names of each party and the amount of assessed benefit against each being herein particularly stated, viz:" then follows the words: "F. H. & W. R. R. Co. $36,879."

After the Act of 1895 and before the Act of 1899 the case of Norwood v. Baker, 172 U. S., 269, was decided, which was understood at the time to give the death-blow to arbitrary assessments without special finding of benefits and the Act of 1899 was passed obviously in view of that case. It is our contention, and always has been, that that was intended to cover the whole ground and was a repeal of the Act of 1895. And this was the opinion of the then

Corporation Counsel and the decision of the Superior Court. See Record, p. 36 and Record, p. 45.

The committee on streets thereupon made the report, Exhibit 4, on page 70, recommending that the report of the bureau of compensation be "referred back to the bureau of compensation for a new assessment of benefits and damages in accordance with the provisions of the new street paving law."

Exhibit 5 follows Exhibit 4, both of them speaking of the assessments as for benefits for permanent pavements.

Paragraphs 12 and 13 on page 79 state in terms that the hearing was concerning the assessment for benefits, and was made upon that theory. The bureau of compensation inquired of the then corporation counsel whether they had any discretion as to the amount of the benefits (see paragraph 15, page 79), and were advised that they had no discretion. (See the opinion of the corporation counsel contained in paragraph 40 on page 54 of the Record.) No suggestion is therein made that the assessment could be treated in any other way than as an assessment of benefits.

After the Act of 1899 was passed the bureau of compensation inquired of the then corporation counsel, Judge A. Heaton Robertson, as to whether they could assess benefits against said railway company because of its track, and were informed by him that they could do so under the Act of 1899 and could not make any assessment under the Act of 1895. (See his opinion on pages 35 and 36 of the Record.)

The defendant in the first appeal concerned itself mainly with the claim that this assessment was valid as an assessment of benefits, that the Act of 1895 was not repealed by the Act of 1899, and that the assessment in question could be treated as merely a continuation of the liability to repair.

It did not claim at that time that it could be treated as an amendment to the charter of the company (see the claims of law of the defendant stated upon pages 56 and 57, and the appeal stated upon pages 71 and 72). It was only after finding that the assessment as an assessment of benefits could not be sustained under the Connecticut law as it stood, and could not be sustained as an exercise of the taxing power, that it was claimed to be justified by the police power, as appears by the first opinion of the court, (see the first opinion on pages 18 and 19) the important part of which is as follows:—

"The plaintiff further objects to the application of the rule of assessment against it provided for in the Act of 1895, upon the ground that the provisions of that act authorizing the defendant to charge against the plaintiff and collect from it the cost of the prescribed portion of any new pavement, if in force, would be unconstitutional and void. This objection comes rather late in the history of legislation of this general character and is, we think, not well founded. Plaintiffs-counsel discuss the question chiefly as one involving the assessment of benefits by reason of public improvements. We need not stop to inquire whether the objection in this form is one which would be well taken, since it is quite evident, as we have already had occasion to observe, that the legislation in question did not regard the charge to be imposed upon the plaintiff as one of that character, and since constitutional justification for the legislative attempt to impose upon the plaintiff the burden of a definite portion of the cost of the highway improvement can be otherwise so easily found."

"The establishment, maintenance and regulation of highways is within those powers of the state which are commonly designated as police powers. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650; Jones v. Brim, 165 U. S., 180; Hudson County Ry. Co. v. Hoboken, 41 N. J. L., 71; Goddard, Petitioner, 16 Pick., 504. *In the exercise of this power of highway regulation the state may of itself and directly or through its authorized municipal or other agencies decide what repair or improvement public comfort*

or safety requires and determine upon whom the burden thereof should reasonably fall. The power of the state in these matters, as in all others involving the exercise of the police powers, is of course not unrestricted. The regulations must be reasonable and the burden must be reasonably cast. The action must not be arbitrary, oppressive, partial, or unequal. Woodruff v. Catlin, 54 Conn., 295; New York & N. E. R. Co's Appeal, 58 Conn., 532; Goddard, Petitioner, 16 Pick., 504; Borough of Greensburg v. Young, 53 Pa. St., 280; North Hudson County R. Co. v. Hoboken, 41 N. J. L., 71; Lawton v. Steele, 152 U. S., 133."

(See also opinion of the court on the 2d and 3d appeals, see pages 22 and 108 of the Record.)

The italics in the above quotation are the plaintiff's own.

The authorities and arguments which induced the Supreme Court to abandon the theory that this so-called assessment could be sustained as a valid exercise of the taxing power are cited under point F; although they are not perhaps pertinent to the case in this court because the claim that it is a valid exercise of the taxing power has been practically abandoned.

The fact that the Supreme Court of Connecticut has said that the Act of 1895 is an exercise of the police power does not prevent this court from deciding to the contrary if the decision of the Supreme Court of Connecticut appears wrong. The construction of a state court of its own statute so far as it concerns the scope and effect of that legislation may be final, but so far as it concerns the nature of the legislation it is not final. The state court by placing a particular label on an act cannot estop this court from examining the question whether the label is a correct definition. For instance, a state court cannot call an act criminal so as to prevent this court from saying it is not. (See Huntington v. Attrill, 146 U. S., 657.) In the case of Huntington v. Attrill this court uses the following language:—

"The test is not what name the statute is called by the Legislature or courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public or a grant of a civil right to a private person."

In Yick Wo v. Hopkins, 118 U. S., 356, Mr. Justice Mathews, in placing a different interpretation on the results of an ordinance in San Francisco from that delivered by the California Supreme Court, says:—

"That, however, (i. e., the statement that it was for the California court finally to construe the ordinance in reference to its own Constitution) does not preclude this court from putting upon the ordinances of the Supervisors of the County and City of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge. We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question."

See also the opinion of Mr. Justice Brewer in McCullough v. Virginia, 172 U. S., 102. When the interpretation is itself part of the federal question the state court cannot estop this court. (See North Western University v. Ill., 99 U. S., 309; Yazoo & Miss. Valley R. R. Co. v. Thomas, 132 U. S., 174.) This court may follow the construction of a local statute where it raises a purely local question, but it is not bound to follow the local courts in questions of general law. See Hollingsworth v. Parish of Tensas, 17 Fed. Rep., 109. The Reports say in that case, "The rule adhered to by the Supreme Court seems to be that Section 34, Judiciary Act 1789, should be observed only where the decisions

credited were or are based on the statutes or laws of the state which fix rights to things intraterritorial in their nature or which fix rules of property." (18 Wall., 584; 16 Pet., 1; 18 How., 520; 14 Wall., 665; 92 U. S., 494.) In this case the local courts sought to justify the taking of property for levee under the police power and therefore claim that the party whose property was taken was not entitled to compensation. The Federal Court decided that property could not be so taken under the police power; that the act was in its nature an exercise of the right of eminent domain and that the plaintiff was entitled to compensation, and the court uses the following language:—

"These courts (speaking of the Federal courts) have uniformly held that the police power is a different prerogative power and extends only to regulating the owner's use and dominion of private property, not to taking from him or dispossessing him of its use and control."

The question whether a particular act is an exercise of the police power or taxing power is one of general and fundamental law involving as it does a definition of the extent and nature of general governmental powers, which powers are not peculiar to any particular state or jurisdiction, but are exercised by all governments, state or municipal.

B.

The position taken by the Supreme Court of Connecticut and by the defendant in error is, as we understand it, that notwithstanding the fact that the Act of 1895 is apparently an exercise of the taxing power and invalid as such, that portion of it which affects the plaintiff is valid because the legislature might have imposed a similar charge under the police power. The plaintiff claims that the judgment of

the Supreme Court in this respect violates the Constitution of the United States because it deprives the plaintiff of its property without due process of law contrary to the provisions of Article 14 of the Amendment to the Constitution, and denies to it the equal protection of the laws. As the distinction is clear between the police power and the taxing power, and each is governed by its own rules, the individual affected is entitled to require that statutes passed in the exercise of the power of taxation shall not be used for the purpose of enforcing the police power, and that statutes passed for the purpose of exercising the police power shall not be used for the purpose of extorting revenue. Due process of law and due regard for the rights of the individual require that in each case the legislature shall be governed by those considerations which properly govern in the exercise of the particular power which is exercised and not by those peculiar considerations which ought to govern the exercise of other powers.

While the court cannot read the minds of the legislators to know whether they were so governed or not but must decide on such considerations as the record discloses, presuming that the declared intention of the legislature is the real one, yet it can and must examine the act itself in order to see whether the legislature was apparently governed by the considerations appropriate to the exercise of the taxing or police power, as the case may be. If the act is apparently on its face of such a character as to indicate that the legislature intended an exercise of the revenue power, the act must be judged by those considerations of fundamental laws which affect that particular power. The court cannot presume that the legislature would have come to the same conclusion if they had been considering solely the question of

public necessity and convenience and other questions which affect the police power. To declare the act something which it is apparently not is to pervert the will of the legislature. Even in legislative matters the plaintiff is entitled to a judgment of the legislature based upon those considerations, or at least apparently based upon those considerations which alone justify the exercise of the power, otherwise it is deprived of its property without due process of law and contrary to the law of the land. No principle is more firmly established in the law of this country than the principle that the police power shall not be used for revenue purposes and that where the main intent of the act is to raise revenue it cannot be supported under the police power, although such result may in some cases follow incidentally from the exercise of the police power. (See Freund on the Police Power above cited; see also Dillon on Municipal Corporations, section 350 to 360 and section 768. New Haven v. New Haven Water Co., 44 Conn., 105; State v. Galvin, 67 Conn., 29.)

It is plain that the Legislature in this case supposed it was exercising the taxing power for the purpose of raising revenue, and was governed by the considerations appropriate to such action. Even if it could impose the same charge under the police power, the court cannot assume that it would do so. To so decide would be to assume the exercise of legislative discretion and usurp the functions of the legislative power.

C.

It is claimed that there are exceptions to the rule that police power cannot be used for revenue purposes under which the claim made by the defendant can be supported. Among such apparent exceptions are the following: (1st)

The licensing power, which is a branch of the police power, may be used in such a way as incidentally to produce revenue, as is illustrated by a high license law designed to restrict liquor saloons, bowling alleys, theatrical performances in some cases, and other occupations which if allowed to be too numerous may result in injury or annoyance to the public. (See Dillon on Municipal Corporations, pages 357-361.) Where, however, no such claim can be made the licensing power can never be used for purposes of revenue. (See Dillon on Municipal Corporations, pages 357-361, section 768. New Haven v. New Haven Water Co., 44 Conn., 105.)

(2d) A certain class of cases where the operation of the business is such that it results in a nuisance or danger to the public. In such cases the party responsible may be compelled to take such measures as may be necessary to prevent a nuisance, or in exceptional cases where it may be necessary, the governmental authority may do the work itself and compel the individual or corporation to bear a portion or the whole of the expense. These cases come under the rule "sic utere tuo ut alienum non laedas." The law may compel the individual to assume, or even to bear the expense, of measures necessary to prevent public injury.

A large number of authorities cited from the Connecticut Reports sustaining the right to compel the removal of grade crossings by the railroad companies, or the payment of the expense of doing so. Under this head are Woodruff v. New England R. R. Co., 59 Conn., 63; Westbrook's Appeal, 57 Conn., 95; Railroad v. Waterbury, 60 Conn., 1; N. Y. & N. E. R. R. Co.'s Appeal, 62 Conn., 527, 538; Doolittle v. Branford, 59 Conn., 402; N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S., 556; N. Y. & N. E. R. R. Co.'s Appeal, 58 Conn., 532.

These are all cases where the railroad has been compelled to remove grade crossings or pay the expense of removal, on the ground that they were a public nuisance, dangerous to life, caused by the railroad, and which it was the duty of the railroad to remove. They are strictly cases of the exercise of the police power, coming under that branch of the police power which compels the party owning property or exercising a right, to prevent his property or his right from injuring others. Judge Andrews says, in the case of Doolittle v. Branford, that "For fully twenty years the legislature of this state has been devising laws to prevent the destruction of human life at railroad crossings of highways." And referring to the case of Westbrook's Appeal, uses the following language:—

> "'Its object (speaking of the law) is to change or remove certain conditions, lawful in themselves, but which have become a source of danger to life and property. The remedy consists in requiring those charged with the duty of maintaining highways to change the conditions and thereafter discharge their duties in such a manner as to avoid the danger."
>
> And again, "In fact such crossings are public nuisances dangerous to human life, and no man has a vested interest in the creation or continuance of such a nuisance. In the exercise of the power of protecting human life the legislature may at any time without notice abate it or prevent its existence."

In N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S., 556, in which the constitutionality of such legislation was contested, Mr. Chief Justice Fuller, in rendering the opinion of the United States Supreme Court, says, quoting from the N. Y. & N. E. R. R. Co.'s Appeal, 58 Conn.:—

> "The Court, in 58 Conn., 522, on this company's appeal, held that grade crossings were in the nature of nuisances, which it was competent for the legislature to cause to be abated and that it could, in its discretion, require any party responsible for the creation of the evil, in the discharge of what were in a sense governmental duties, to pay any part or all of the expense of such abatement."
>
> And again, "The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury."

Traction Co. v. Elizabeth, 58 N. J. L., 619, cited by defendant, involves the constitutionality of an ordinance forbidding the use of salt on the railroad track to remove snow, obviously a police regulation preventing the use of property of the railroad in such a way as to injure others, or to interfere with the use of the highway. What particular light that can throw upon this case is not apparent.

These cases all come under the head "sic utere tuo ut non alienum non laedas"; that is, the right to compel a party who creates a danger to the public life or health or a nuisance to either remove the nuisance itself or bear the expense necessarily resulting therefrom. Furthermore, they are all acts plainly directed to that end.

Chief Justice Andrews said in the case of the New York, New England Railroad Co., "It being established by the legislature and by the repeated decision of this court that grade crossings are in the nature of a nuisance and dangerous to life, the right of the legislature to cause them to be abated and to require either party to pay the whole or any portion of the expense cannot be questioned." (See 63 Conn., 540.)

The constitutionality of these regulations came before this Supreme Court in the case of N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S., 556.

These orders for the abolishment of grade crossings and the apportionment of expense, etc., are made in Connecticut, generally, by commissioners, who find that the crossing is dangerous to life and that it should be removed, and that certain portion of the expense, or in some cases the whole, should be paid by the railroad company causing the nuisance. The Courts in some of these cases referred to the power of amendment, but such reference was wholly unnecessary because the police power could not be bargained away, as stated, and the acts compelling the removal of the crossings and the payment of the expense were fully justified by the necessities of the police power.

Had this act been accompanied by a resolution of the state that the new pavement had become necessary as a method of repair in order to remove a nuisance or danger created by the railroad, a different case would have been presented. It might then be claimed that, except in extreme cases, the finding of the legislature or of the proper authorities of the city could not be questioned, but there is no such resolution or finding in the act. So far as appears from its face it is not based upon any such consideration, so that any court can infer any such finding. On the contrary, the whole legislative act, as judged by its language and construed by the city and by its constituted authorities, including the corporation counsel, shows that the design was to raise revenue and not to remove or mitigate a nuisance for which the railroad was in any way responsible.

Besides this class of grade crossing cases certain other

cases are quoted in the opinion of the court as authority for its position. Most of these, however, reduce themselves to the same class of regulation providing for the removal of a nuisance created by the party affected. Among these are the following:—

The case of Inland Fisheries v. Holyoke Water Co., which went to this Court and was decided under the name of Holyoke v. Lyman, 15 Wall., 500, arose upon the constitutionality of an act requiring the Holyoke Water Company to construct fish ways in a dam constructed by it across the Connecticut River at Holyoke. The court says that "a person who builds a dam on a stream frequented by fish, exercise or takes that right subject to the obligation to keep open sufficient sluices or fish ways for the passage of fish during the proper season." The case was simply one where the company erecting the dam was compelled to remove a public nuisance which it had created. The court refers in that case to the power of amendment, but that was not at all necessary. The police power was a sufficient sanction.

The case of North Hudson County R. R. Co. v. Hoboken, 41 N. J. L., 70, involved a regulation requiring the railroad to conform its track to the grade of the street, also requiring repair between the rails, and the court says the grantee should hold its privileges subject to such regulations as are reasonably necessary for the common use of the street for the purposes of a street railway and for ordinary travel. This also comes under the rule requiring the company to prevent its tracks from being a nuisance.

The City & Suburban R. R. Co. v. Savannah, 77 Ga., 731, is a street watering case and is supported on the ground that cars tend to create or increase the dust and therefore

it is reasonable to require the railroad to water the street and remedy the nuisance which they have created.

The case of Bulkley v. New York & New Haven R. R. Co., 27 Conn., 479, is a question concerning the right to pass a law compelling railroads to construct cattle guards to prevent cattle from being killed by the cars. It is difficult to see how that bears on this question.

The case of Shields v. the State of Ohio, 95 U. S., 319, involves the constitutionality of a regulation of a rate of fare on railroads. All railroad companies take their rights as public carriers subject to the right of the state to regulate the amount of fare in the interest of the public. Such regulations are designed directly to secure the public convenience and to prevent the railroad from charging an exorbitant rate. All railroads take their rights as public carriers subject to this right on the part of the state. The railroad gets no vested right to charge an unreasonable fare because the legislature cannot bargain away its right to the exercise of the police power which clearly includes the right to prevent unreasonable charges. The court says in this case, "Beyond the sphere of the reserve power the vested rights of property of corporations in such cases are surrounded by the same sanction and are inviolate as in other cases."

Another class of cases have been cited as authority, including those under which adjoining proprietors are required to keep their sidewalks in repair and to clear off snow. This class of cases has been a subject of controversy between the courts, the courts of a number of the states holding that such regulations were unconstitutional as involving an attempt to impose a portion of the duties of the public upon the individual without justification, and thereby taking property without due compensation. One of the leading cases on

this point is State v. Jackman, 69 N. H., 318, 42 L. R. A., 440. Of such a charge the court uses the following language:—

"It would seem unnecessary to go further; but the ordinance stands no better on the ground that it is an exercise of the police power inherent in all municipal and state governments, and which, it may be conceded, properly extends to 'the protection of the public morals, the public health, and the public safety.' Boston Beer Co. v. Massachusetts, 97 U. S., 25, 33, 24 L. ed., 989, 992; Mugler v. Kansas, 123 U. S., 623, 31 L. ed., 205. Nobody doubts that, when an occasion for its exercise exists, the police power may be invoked in behalf of these objects. But it is entirely plain that the ordinance has no real or substantial relation to any of them. It is not an exercise of restraining or protective power, like the 'Dog Law,' so called, or the statute empowering towns to require buildings to be provided with such ladders and buckets as may be necessary for use in case of fire, under a penalty of $6 for every three months' neglect, and other enactments of like character, cited by the state. It is simply an unequal division, for economy and convenience only, of public expense and public burden among a class of taxpayers who have not only once contributed and borne their full share agreeably to their constitutional duty, but who are again required to make contribution, not proportionately and according to the valuation of their property or the benefits they receive, but disproportionately, and solely according to the length of the street lines of their respective lots. This is extortion and inequality, pure and simple; and it is nothing else. See Curry v. Spencer, 61 N. H., 624, 631, 632, 60 Am. Rep., 337. 'An act which operates on the rights or property of only a few individuals, without their consent, is a violation of the equality or privileges guaranteed to every subject.' Merrill v. Sherburne, 1 N. H., 199, 212, 8 Am. Dec., 52." (See also Gridley v. Bloomington, 88 Ill., 554.)

It is important in deciding the question of whether the analogy from the cases sustaining the validity of sidewalk ordinances of this character supports the act in question in

this case, to examine the reasons by which the decision in these cases was supported. One of the earliest of these authorities was the case of Goddard, Petitioner, 16 Pick., 504, the case of an ordinance requiring adjoining proprietors to clean off snow from sidewalks. Judge Shaw says that this is to be "regarded as a police regulation requiring a duty to be performed highly salutary and advantageous to the citizens of a populous and closely built city and which is imposed upon them because they are so situated as that they can most promptly and conveniently perform it, and it is laid not upon a few, but upon a numerous class, all those who are so situated and equally upon all who are within the description composing the class." He also says that where citizens commonly derive a benefit from the performance of some public duty, those who derive such benefit may by a general and equal law be required to do it. And again, "Besides, from their situation, they have the power and ability to perform this duty with a promptness which the benefit of the community requires, and the duty is divided, distributed and apportioned upon so large a number that it can be done promptly and effectually, and without imposing a very severe burden upon any one."

In the case of Paxton v. Sweet, 13 N. J. L., 199, where the question came up as to the validity of an ordinance requiring abutting property owners to curb and lay down a brick way or sidewalk, and if they refused to do so, authorizing the municipality to do the act and recover the expense thereof, the court in its opinion said:—

> "It was slightly insinuated that the ordinance contravenes the fifth amendment to the Constitution of the United States, that private property shall not be taken for public use without just com-

> pensation, and it was judicious not to press the argument. It would have to turn on the adequacy of the compensation which, beside being a matter of mere fact for the jury only, might be proved in ways that are abundant. The citizen receives it in part by its adding to his private property an increase of its intrinsic value, either for sale or by enjoyment by the health and comfort of his own household, by his enjoyment of the like footways everywhere else in which he fully participates, without contributing to their expense," etc.

These charges, therefore, are placed upon the basis, first, of necessity, that is, that the individual can best perform the duty, as can easily be seen in the case of the clearing off of snow, where it would be a matter of extreme difficulty for the city to perform the work within a reasonable time after a storm, whereas the individual can readily perform it.

Second, the clearing off of the snow, or the curbing or paving of the property, was necessary for the enjoyment and convenience of the abutting property owners; the benefit is special and therefore can be sustained on the ground of special benefit to the property owner.

And again, the property owner has the ownership of the fee and a direct and peculiar interest in keeping the means of access to his own property in good condition. These arguments cannot be cited in favor of the assessment in question. In fact, the existence of such considerations in this case is expresssly denied by the finding. The railroad is not required to do the paving, in fact is not even allowed to do it, the city does it itself, so that the argument of necessity fails.

In the sidewalk cases, the universal rule is to order the property owner to do the thing and only in case he does not do it does the city do it in the alternative.

The element of benefit in this case does not exist, as found by the court below. The simple right to run the cars in a straight line over a certain track does not constitute any special right in the highways as justifies this burden.

The reasoning by analogy from these sidewalk cases has been urged before, in cases cited under a later head in this brief where the legislature or the municipality has sought to impose this duty of paving upon the street railroad, and the existence of such analogy has been denied by the courts universally.

The Supreme Court of Connecticut in the case of State v. Richards, 74 Conn., 57, when the constitutionality of a law was raised requiring the adjoining proprietors to repair the sidewalk, did not decide it, but in the case of the State v. McMahon, 76 Conn., 97, sustained the constitutionality of a law requiring the adjoining proprietor to clear off snow, but supports the decision on reasoning of similar character to that stated in the Massachusetts case, that is, the necessity of the case, the fact of title in the sidewalk in the adjoining proprietor and the extreme difficulty of doing the work properly by the city, and on the other hand the facility with which the adjoining proprietor can do it. The Connecticut court in rendering its decision uses the following language (see 76 Conn., 106):—

> "The inhabitants of a city, being the owners and occupiers of abutting land, are the ones, and the only ones, in a situation to render the aid convenient if not necessary to effectually secure that cleanliness and safety which promotes alike the general welfare and their personal interests. The rendition of this aid involves a slight burden, insignificant in comparison with the benefits secured. We think it is clear that in requiring such aid the legislature acts within its legitimate legislative prov-

> ince of defining and enforcing the duties arising under such conditions. A law which merely accomplishes this purpose is valid."

No court has ever sanctioned an ordinance, nor has any ever been proposed so far as known, providing that the state might clear off the snow from the sidewalk and then assess the proprietor for doing the same without imposing any duty upon the proprietor to do the thing first. To compel the proprietor to make such repair is an attempt valid by the law of some states and invalid by the law of others to enforce a regulation which is directly for the protection of the safety and convenience of the public.

The law under consideration in the case before this court does not direct or compel the railroad to construct the pavement; in fact, does not permit it to do so. It only provides for the collection of money to reimburse the city. It has therefore no connection or analogy with the sidewalk cases, and yet the decision of the lower court is based largely upon sidewalk cases as precedents.

It is difficult to see what light is thrown upon this case by the case of Jones v. Brim, 165 U. S., 180, which is a question concerning the constitutionality of an act making a person who drives a herd of horses, asses, cattle, sheep, goats or swine over a highway constructed on a hillside liable for all damages done by such animals in destroying the banks or rolling rocks into such highway, and yet this authority is relied upon by the court in its opinion stated on page 19 of the Record as supporting the decision of this case.

It is equally difficult to see how the case of Lawton v. Steele, 152 U. S., 133, which is a question of the constitutionality of a regulation concerning nets designed to prevent

the extinction of fish by exhaustive methods of fishing, bears upon the case, and yet this also is relied upon as authority by the court in its opinion.

The same criticism seems justified in reference to the quotation of Munn v. Ill., 94 U. S., 113, concerning regulations of the price of the service for elevating grain on the ground that that was a public utility. Powell v. Pa., 127 U. S., 678, concerns the constitutionality of statutes preventing the sale of oleomargarine. It seems a very far cry from that case to this, and yet the court cites that also as authority. The Connecticut court has stated its position concerning police power concisely on page 19 of the Record:—

"The establishment, maintenance and regulation of highways is within those powers of the state which are commonly designated as police powers. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650; Jones v. Brim, 165 U. S., 180; Hudson Ry. Co. v. Hoboken, 41 N. J. L., 71; Goddard, Petitioner, 16 Pick., 504. In the exercise of this power of highway regulation the state may of itself and directly or through its authorized municipal or other agencies decide what repair or improvement public comfort or safety requires and determine upon whom the burden thereof should reasonably fall. The power of the state in these matters, as in all others involving the exercise of the police powers, is of course not unrestricted. The regulations must be reasonable and the burden must be reasonably cast. The action must not be arbitrary, oppressive, partial or unequal. Woodruff v. Catlin, 54 Conn., 295; New York & N. E. R. Co's Appeal, 58 Conn., 532; Goddard, Petitioner, 16 Pick., 504; Borough of Greensburg v. Young, 53 Pa. St., 280; North Hudson R. Co. v. Hoboken, 41 N. J. L., 71; Lawton v. Steele, 152 U. S., 133."

Under this reasoning the adjoining proprietors could be compelled to pay for pavement in front of their premises irrespective of benefits.

The plaintiff claims that this proposition is not good law.

It is true that the state may of itself or through its authorized municipal agency decide what repair or improvement public comfort or safety requires, but it cannot in the exercise of the police power decide upon whom the burden of indemnifying the state for the expense of such improvement shall fall, except possibly in a rare case where the public work or improvement is necessary in order to obviate a nuisance or danger created by the person compelled to pay therefor. In determining upon whom the burden of paying for such improvement shall fall it is exercising the taxing power, either the general taxing power or the special taxing power, that is, the power of assessment for benefits, and its action must be subject to the rules which govern the exercise of the taxing power and differ absolutely from those which govern the police power.

The plaintiff in error believes that a review of the above cases and of all the other well considered cases, except the present decision of the Connecticut Supreme Court now before this court for review, will show that the following is a fair statement so far as applies to this case of the nature of the police power and the rules governing its use.

The police power is that authority by which the state, acting directly or through agents, secures the health, morals, safety or convenience of the public. It springs from necessity and is absolute in its nature. Where such necessity exists, it overrides all so-called private rights of personal liberty or property, and when the legislature is exercising that power, its judgment as to the necessity of the particular exercise is in general final except in extreme cases, and its judgment is also final, in general, as to the propriety of the particular measure adopted, or as to its adaptability to the ends sought.

But the legislature cannot, under guise of the police power, place upon the individual any portion of the general burden of securing the safety, health and convenience of the public, except so far as such burden is justified by the maxim *"sic utere tuo ut alienum non laedas;"* that is to say, where the use of property, or the exercise of rights, is liable to cause injury in any way to the public, the individual may be compelled to take such measures as may prevent that injury.

Under this head come the various cases under which the state compels railroads to water their tracks, to clean off the snow or dirt from between the tracks, to place fenders upon their cars, etc. All these, and regulations like them, are based upon the fact that the operation of the railroad creates or increases a public nuisance which it is necessary to abate. Under the same rule come the cases, some of which have been cited, compelling companies maintaining dams to construct fishways and compelling railroads to elevate or lower their grade at street crossings.

In some cases, where police duties cannot be readily performed by the public directly, the individual owning property may be compelled to perform them with reference to such property, on the ground of necessity. On this ground are to be justified regulations requiring proprietors of houses to keep their property in sanitary condition, to remove garbage, prevent nuisance, etc. On this ground, the various statutes and ordinances compelling the owners of property to clear off snow from the sidewalk, to repair their sidewalks, etc., are justified, it being assumed in those cases that it is highly inconvenient or impossible for the municipality to discharge this duty.

The validity of these ordinances is based upon the necessity of compelling the individual to discharge these duties.

There are numerous cases, particularly in Illinois and New Hampshire, which decide that there is no such necessity and that these ordinances are obviously an attempt to impose a portion of the general public burden upon the individual, and are, therefore, unconstitutional, as the citizen can only be compelled to pay his share of those burdens by taxation. (See authorities cited in Gray's Limitations on Taxing Power and Indebtedness, sections 1982 et seq.)

The police power sometimes authorizes the direct taking or destruction of property, or the compulsion of the individual to do a necessary act where it is inconvenient or impossible for the city to do the necessary thing itself. But the state cannot, under guise of the police power, throw a portion of the expense of discharging its duty upon the individual, except by the taxing power. To say that the particular act being necessary for the public necessity or convenience, the municipality may do that act and then compel the individual, under the police power, to contribute to the expense of the discharging of the public duty, is to impose upon the individual an expense or burden properly belonging to the general public and which is provided for by general taxation. Where an attempt is made to compel such payment by the police power and the same property is liable to taxation, there is a two-fold burden imposed for the same purpose and such action is a taking of property without compensation and without due process of law.

There is a certain class of cases where a dangerous condition is created by a party, as for instance, in the case of a railroad crossing at grade, and where it is necessary to act promptly, where the public authority may do the thing and compel payment by the railroad, or other corporation, of a portion of the expense necessary to obviate the danger or

inconvenience which is created. Such cases come strictly within the meaning of the maxim *"sic utere tuo ut alienum non laedas."*

The applicant believes, it can be stated, with certainty, that no well considered case can be found where the state, by itself or through its agents, municipal corporations, etc., has completed a necessary public work, and, under the police power, imposed a portion of the expense of doing that work on the individual, except where the necessity for such work is caused, in whole or in part, by the existence of some property, or the exercise of some right, by the individual upon whom such expense is imposed.

We believe that all the cases except the decision of the Connecticut court in this case can fairly be brought within this rule, that a decision that the legislature can absolutely impose this duty in all cases of repavement independent of the circumstances of the case, stands alone in the history of American jurisprudence, and introduces a note of discord where there was previous harmony. The logic of the opinion of the Connecticut Supreme Court would justify the assessment of the whole cost of the street pavement on the railroad.

This court has had recent occasion to consider the subject of the police power in the case of Chicago, Burlington & Quincy Railroad v. People of the State of Ilinois, decided in March, 1906, 200 U. S., p. 561. The law of Illinois, under which the case arose, provided in substance that a railroad company might be ordered where it crossed a steam to construct its culverts or bridges in such a way as not to interfere with the free flow of water; that in case they did not do so, the proper authorities might do the work and charge the expense to the railroad. The authorities sought to compel the rail-

road by mandamus to comply with this duty and to reconstruct its culvert in such a way as to accommodate the flow of the stream. The railroad claimed that, inasmuch as the bridge as originally constructed accommodated the flow of the water as it was at that time, it could not be compelled to reconstruct the bridge to accommodate any increased flow of water resulting from drainage operations. The case turned upon this question, and the majority of the court decided (there being, however, a strong dissent) that the railroad could be compelled to construct its bridge in such a way that it should not interfere with flowage of the stream, although such a flow had been increased since the construction of the bridge. The nature of the police power was extensively discussed in this connection. This case is a plain illustration of the maxim that under the police power a property owner may be compelled to submit to such regulations or burdens as are necessary to prevent its property or structures from being a public nuisance. The case of Western Chicago Street Railway Co. v. People of the State of Illinois, 201 U. S., 506, is an illustration of the same principle; that it, the duty of the Street Railway Co. to so change a tunnel as to prevent its being a nuisance to navigation, but the fact that so many of the judges of this court dissented from that judgment shows that there is a limit to the extent to which property holders may be compelled to submit to burdens even under this claim, and that these cases went to the extreme verge of the doctrine.

The case of Doughton v. City of Camden is another of the cases where the imposition of public burdens for cost of improvements has been sought to be justified under the police power, and such claim has been repudiated by the courts. This case was decided in the Court of Errors and

Appeals of New Jersey, March 5th, 1906, and is reported in the 63d Atlantic Reporter, page 170.

The case in question does not come within these rules.

The act of the legislature is general. It passes no judgment in regard to the necessities of any particular case. The obligation to repave attempted to be imposed thereby is independent of any conditions of necessity caused by the existence of the railroad. It is independent of whether the pavement is suited, or not, to the conditions. In this particular case, it is found to be unsuited to the conditions and to aggravate and increase any evil that may result from the operation of the road. The road, finally, by its charter and by the general legislature of the state, is subject to laws which fully and adequately secure the protection of the public from any injury resulting from the operation of the road, and such laws and regulations still continue in force and are neither repealed nor modified by the law of 1895, nor the action of the council in making this assessment. (See acts stated on pages 2-4 of brief.)

D.

It has been repeatedly decided that street railroads cannot under the police power be compelled to assume the duty of constructing pavements between the tracks and two feet on each side.

This is not by any means the first time that the attempt has been made to compel street railroads to relieve the municipality from the expense of constructing new pavements. The books are full of such cases All the arguments used by the counsel for the city in this case are familiar. The attempt has frequently been made to convert the ordinary obligation to keep in repair into an obligation

to pave or repave, or to pay the city for so doing, and the attempt to compel the payment of the expense of such pavement under the police power or the power of amendment to the charter, is also familiar.

In fact, this question is a battle ground of the law. We believe that an examination of the cases will show that in every case where these questions have fairly arisen, unaffected by some peculiar phraseology in the charter of the corporation, or in the conditions under which they originally acquired their rights, that these contentions have been decided adversely to the claim of the city in this case.

The latest pronouncement of the courts on this subject was in the case of Fielders v. North Jersey Street Railway Co., decided by the Court of Errors and Appeals of New Jersey, Nov. 17, 1902, 53 Atl. Rep., 404; 59 L. R. A., 455. This case was an action against a railroad company for damages, alleging that the plaintiff was injured by the conduct of the railroad company, first, in bringing the car to a stop at an unsafe and improper place; secondly, that the conductor negligently directed plaintiff towards her destination; and third, that the company had neglected to repair the street pavement as required by the terms of a municipal ordinance. The first two were withdrawn from the jury and the jury found a verdict in favor of the plaintiff on the third ground. The Court of Errors and Appeals decided that the ordinance requiring the railroad company to perform the duty of paving and repaving and keeping in repair the space between the rails of their tracks and between the track and for one foot outside of each outer track, was an assumption of the power of taxation and could not be supported under the police power. The court uses the following language:—

"Assuming the validity of the ordinance, it seems to us not to admit of the construction that it was designed for the safety of travelers upon the street as a class. On the contrary, the design is to impose upon the street railway company a share of the public burdens of the municipal government."

"The powers to which we are thus referred are properly classed among the police powers of the municipality. The distinction between the police power and the taxing power is entirely clear. The former extends merely to the regulation of those matters that are confided by the legislature to the municipal corporation for that purpose, including the power to exact reasonable fees, not for the purpose of revenue, but only as incidental to the power of regulation. The power of taxation is exerted in order to compel citizens and property owners to contribute to the support of the municipal government. Tiedeman, Mun. Corp., secs. 116, 123, 124, 253; Dill, Mun. Corp., 4th ed., secs. 141, 357-360, 768." . . .

"It is needless to say that this extended reference to familiar decisions has been made, not for the purpose of showing the existence of a distinction that is so universally recognized, but for the purpose of showing how rational is the distinction, and how easy of application, and in order to demonstrate how impossible it is that a power conferred by the legislature for the purpose of regulating the streets of a city, and the use of the streets by traction companies and others, can, by any defensible interpretation, be so stretched as to cover an ordinance of the character of that now before us. The traction company is in the enjoyment of a public franchise granted by the legislature. It is a use of the streets differing only in kind from that of other citizens using them, and has no interest in the soil. It is under a general obligation to keep its rails in repair so they shall not become an obstruction to travel. It is also bound by any contract it may lawfully have made with the municipality in consideration of the grant of its local privileges. But entirely independent of

any such consideration, and irrespective of any disturbance of the street surface in the operation of the railway, this ordinance attempts to impose upon every traction company, the duty to pave a considerable portion of every street over which it passes, although it may bring no additional wear and tear upon the pavement, and the further duty to keep such pavement, when laid, at all times in repair. *To call this 'regulation,' or an exercise of the police power, is a misuse of terms. It is taxation pure and simple.* It calls upon the company to perform a function not essentially different in character, although vastly more onerous, than the once familiar operation known as 'working-out' the township road taxes by the labor of the inhabitants. Gen. Stat., p. 2817, secs. 51, *et seq.* A power that will not support the imposition of license fees fixed on a revenue basis will certainly not support an ordinance of this character. We therefore hold that the ordinance is not supportable as an exercise of the police power, and, since no other legislative authority exists for its enactment, it imposed no duty upon the defendant company to repair the pavement between its rails, or to repave that portion of the street."

The italics in above quotations are the plaintiff's own.

See also Philadelphia v. Hestonville M. & F. Pass. R. R. Co., 177 Pa. St., 371; 35 Atl. Rep., 718;
McKeesport v. McKeesport Pass. R. R. Co., 158 Pa. St., 447; 27 Atl. Rep. 1006.
Binghampton v. Binghampton & P. D. R. R. Co., 61 Hun., 479; 16 N. Y., Supp., 225;
Baltimore v. Scharf, 54 Md., 499;
Parmelee v. Chicago, 60 Ill., 267; quoting with approval Chicago v. Sheldon, 9 Wall., 50; 19 L., ed. 594;
Norristown v. Norristown Pass. R. Co., 148 Pa. St., 87; 23 Atl. Rep., 1060;
Oshkosh Street R. R. Co. v. Winnebago County, 89 Wis., 435; 61 N. W., 1107.

The case of Coast Line Railroad Co. v. Mayor and Aldermen of the City of Savannah, U. S. Circuit Court District of Georgia, Feb. 8, 1887, 30 Fed. Rep., 646, is in point.

In that case the railroad was authorized to lay its rails in a highway and in the ordinance it was provided that "in the event of the paving by the city of the whole or any portion of the streets used by said railroad company, the portion of the track between the rails shall be paved and kept in good order and thorough repair by the company at its own expense and cost." Subsequently, the legislature authorized the city to pave the streets, assess two-thirds of the cost on abutting real estate, and in section 2 provided that any street railroad company having tracks running through the streets of said city shall be required to macadamize or otherwise pave as the said mayor and aldermen of the City of Savannah may direct, the width of its tracks and three feet on each side of every line of track now in use or that may hereafter be constructed by such company. The statutes contained a general provision empowering the legislature to withdraw the franchise of a private corporation unless such right was expressly negatived in the charter. The court enjoined proceedings to enforce the ordinance on the ground that the ordinance violated the provisions of the contract and was not justified under the provisions of the law authorizing the withdrawal of franchises. The court refers in its decision to the case of Chicago v. Sheldon, 9 Wall., 50, and other decisions of the Supreme Court of the United States, as supporting the position that the ordinance was invalid, violated the provisions of the contract with the railroad company, and therefore was contrary to section 10, Article I, of the United States Constitution.

It is true that the claim that the ordinance was valid as

an exercise of the police power was not made in that case. It appears singular that if the Connecticut act of 1895 is an attempt to exercise the police power and is valid as such an attempt, that this claim was not made, for then the statute of Georgia, which was under consideration, was also a valid exercise of the police power. In fact, so far as the act is set out in this report, it appears to be very similar to our own act. It never seemed to occur to the counsel in this case, nor to the Court, that the act in question could be considered an exercise of the police power. If it had been, of course no contract would have been of any validity as against it, because the police power cannot be bargained or contracted away. We think it fair to claim the case, therefore, as an autnority against the position that such acts can be justified under the police power, as that claim was not deemed worth considering in this case.

The case of City of Chicago vs. Chicago Union Traction Co., 65 N. E., 234; 199 Ill., 259, is an interesting one in this connection, as it clearly draws the distinction between what can and what cannot be done under the police power. It must be borne in mind that this is a Chicago case, decided in the same jurisdiction where the case of Chicago vs. Sheldon, 9 Wall., 50, was decided, which decides that a railroad which had constructed its road under a franchise requiring it to repair could not be required to repave. The case of Chicago vs. Union Traction Co., therefore, illustrates the distinction, and the basis upon which these various orders to railroads and others concerning matters to be done in the public interest are based.

The ordinance in question in that case provided that street railroads should remove dirt, snow, and other accumulations

from so much of the street as lay between the two outermost rails upon said tracks and also upon such additional surface of the width as may be prescribed in any ordinance relating to or affecting any such street, avenue or alley, and shall respectively clean, etc.

The railroad was prosecuted for not complying with the ordinance requiring it to clean off the dirt from the space between the rails. The Court, concerning the police power, makes the following statement: "It is clear that the city could not, by virtue of the police power, or otherwise, require the defendant in error company to clean and repair the street, if the real purpose is merely to shift a public burden from itself to the company"; citing in that connection, Gridley vs. City of Bloomington, 88 Ill., 554; 30 Am. Rep., 500; and again, quoting from the case of City of Chicago vs. O'Brien, 111 Ill., 532; 53 Am. Rep., 640, it says: "A purely public burden cannot be laid upon a private individual except as authorized in cases to exercise the right to eminent domain, or by virtue of proper proceedings to enforce special assessments or special taxation"; and in the opinion the Court says: "The evidence shows that portion of the pavement of the street, meaning between the rails, for the convenience of the company, has been constructed differently by the company from what it otherwise would have been laid; that on that portion of the street covered by the tracks of the street railway, the pavement has been laid flat, thus giving the surface of the street a flat crown of the width of 16 feet, when, but for the tracks of the railroad, the pavement would have been laid with a slope from the center of the street to the gutter upon either side, and that the rails of the tracks prevented the filth from reaching the gutters. It further appears that the tracks of the railway interfere

with the work of cleaning both that portion of the street within the tracks and also that portion of the street between the outermost rails of the tracks and the gutters."

It refers also to other evidence showing the injurious effect of the location of the track and the operation of the railroad. The Court then says: "All these things must be considered in determining as to the reasonableness, necessity and justice of the requirements of the ordinance, . . . It does not appear unreasonable that a traction company having, in the exercise of the special privilege enjoyed by it of using the street, contributed to the unsanitary condition which injuriously affects the public health and comfort, should be required to aid in removing such conditions."

This ordinance, therefore, was justified strictly on the ground of the maxim that a person owning property or using a privilege, must so use it as not to injure others, and must submit to any reasonable regulations or burdens necessary to prevent such injury.

The case is a fair sample of the numerous cases supporting ordinances concerning the clearing off of snow by railroads, the sprinkling of streets, and a certain measure of repair, all of them being based upon the theory that something has been done or caused by the company which it is necessary to remedy, and that regulations for that purpose are a legitimate exercise of the police power. It is an important feature that these numerous cases are decided by the same tribunals which have decided that ordinances or laws requiring street railways to repave as often as the city sees fit to [illegible] it, are invalid.

See also on this point State vs. Canal & Claiborne R. R. Co., 50 La. Ann., 1189; 56 L. R. A., 287; compare with

this, State vs. New Orleans City & State R. R. Co., 49 La. Ann., 1571; 39 L. R. A., 618.

The case of Western Paving and Supply Co. vs. Citizen's St. Ry. Co. of Indiana, 128 Ind., 525, 10 L. R. A., 770, is squarely in point. This case was decided in 1891 and arose under the following circumstances:

The Citizen's Street Railway Co. took its rights under an ordinance providing that the said company shall keep the tracks and two feet on the outside of each rail, together with all bridges and the crossings of all gutters, at all times in good repair, to the satisfaction of the common council. This ordinance was passed and the company was required to signify its acceptance of it, which it did. Subsequently, an ordinance was adopted in which it was provided that when any street upon which there existed a line of railroad was improved from curb to curb, the improvement should be made under the contract as required by law, and that the street railway company should be liable to the contractor for its proportion of the total cost to be determined by the city engineer, according to the method prescribed in the ordinance.

In 1889, an ordinance was passed for the paving of two squares on the street with asphalt and the proportion to be paid by the railroad was settled in accordance with the ordinance of 1884, but the street railway refused to pay, whereupon the contractor brought suit for that amount. The Court ruled that the railroad could not be compelled to make such payment; that the contract to repair did not impose an obligation to improve. It quotes with approval the case of Coast Line R. R. Co. vs. Savannah, and State vs. Corrigan C. S. R. R. Co., 85 Mo., 263; also quoting the opinion in that case, that an ordinance attempting to im[illegible]

such additional burden, that is, the burden to repave, could not be sustained on the ground that it was a proper exercise of the police power of the state. The Court decided that the street railway company could not be assessed for the expense of paving or repaving the streets of the city of Indianapolis, and that it was protected under the ordinance which it had accepted, which bound it simply to repair.

The case of City of Chicago vs. Sheldon, decided in 1870, 9 Wall., 50, is a leading authority which has been cited over and over again, and always with approval and never with any suggestion of criticism. The case is as follows:

In May, 1859, the common council gave the street railway company power to lay its tracks in certain streets, and provided that the surface of the streets was to be laid with improved modern rails and laid so that carriages and other vehicles could easily and freely cross the tracks at any points and in any and all portions. It also provided that the said company shall, as respects the grading, paving, macadamizing, filling or planking of the streets upon which they shall construct said railways, or any of them, keep eight feet in width along the line of said railway on all the streets whenever one track is constructed and sixteen feet in width along the line of said railway on all streets where two tracks are constructed in good repair and condition. Subsequently, the city sought to impose an assessment of a considerable amount on the railroad for pavement. The Supreme Court decided that no such assessment could be made; that the obligations of the railroad were fixed by the ordinance which it accepted, which constituted a contract. It is noticeable that the police power was not even claimed in this case to justify the burden.

In State v. Corrigan St. Ry. Co., 85 Mo., 263; 55 Am.

Dec., 361, the facts are that the defendant company, or its predecessors in right, were authorized by ordinance of the city to lay their tracks through a certain street, and the ordinance authorizing them to do so contained a provision as follows:—

> "The space between the rails of said track and the street for a space of two feet on either side and along the line of said track, and also all street crossings along the line of said street railroad, shall be kept and maintained in good repair by said railroad company, and passing, crossing or traveling upon or along the streets and avenues upon or along which said street railroad may pass, shall in no wise be obstructed by said railroad company."

Subsequently, a general ordinance was passed by the city providing that any railroad occupying any portion of the street should keep the track and the space adjoining and on the outside of such rails for a distance of 18 inches in width paved with the same material as the rest of the street should be paved with. The city sought by mandamus to compel the construction by the railroad of a new pavement between the rails and 18 inches on either side. The railroad proceeded to put down a different pavement over the track. The Court refused the mandamus. They say in their opinion:—

> "The obligation to repair a street is one thing and the obligation to reconstruct a street is another and different thing. To repair a thing is to restore it to a sound state after decay, injury, dilapidated, or partial destruction. To reconstruct is to construct or build again. One who only assumes an obligation to repair a house could not be required to tear it down and rebuild it. Without torturing the language of section 4 of the ordinance of 1869 and turning it away from its ordinary meaning, we

> cannot construe it so as to impose on defendant an obligation to reconstruct a street when in express terms it says the street shall be maintained and kept in good repair. The following authorities hold that an obligation to repair a street is not an obligation to construct thereon a new pavement: Chicago vs. Sheldon, 9 Wall., 50; District of Columbia vs. Washington R. R. Co., 4 Am. & Eng. R. Cas., 174. The principle announced in the case of Chicago vs. Sheldon is approved."

In this case and other Missouri cases to the same effect, it is shown that this is the settled doctrine of the State of Missouri.

As to the ground that the ordinance under discussion could be justified under the police power, the Court, in the Corrigan case, in deciding that it could not be so justified, uses the following language:—

> "It is also insisted that the ordinance of 1884 can be maintained on the ground that it is a proper exercise of the police power of the city, and that such power cannot be bargained away. Police power, if capable of a definition, is defined as follows, by Mr. Cooley, in his work on Constitutional Limitations, in chapter 16: 'The police power of a state in its comprehensive sense embraces its whole system of internal regulation by which the state seeks not only to preserve the public order and prevent offenses against the state, but also to establish for the intercourse of citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights of others.' We cannot perceive how it can be claimed that the said ordinance of 1884, which it is said imposes upon defendant the duty of paving a part of the streets on which it operates its railroad, under a grant from the city, obliging it to repair and not to

repave, is embraced within the police power of the city as above defined, especially so in view of the fact that the city had full power conferred on the council by its charter to do the very thing it seeks to require defendant to do by virtue of said ordinance. The city could not, under the pretense of exercising its police power, shift the duty delegated to it by its charter of paving the streets, if public good required it to be done, and charging the cost to adjacent property owners, from its shoulders onto the defendant."

"We cannot give assent to the doctrine contended for, that by virtue of the ordinance of 1869 defendant obtained simply a license to expend large sums of money in constructing its railway, and at a time when the success of such a scheme was experimental, equipping it at great cost, assuming an obligation to keep in repair a certain part of the street, which license was and is revocable at the pleasure of the city."

In the case of Pensacola v. Northrop, 66 Fed. Rep., 689, decided in 1895, the facts were that a foreclosure was brought in favor of bondholders of the Pensacola Terminal Co. Application was made that the receiver pay certain sums assessed for paving the street between the rails and one foot on each side. This demand was sought to be justified under an ordinance requiring the company to pave such space in the manner which the municipality should contract for paving the entire width of the street.

The company had been incorporated prior to the passage of this ordinance and while an ordinance was in force requiring the railroad to keep the street between the rails and one foot on each side thereof in good condition. Subsequently to the incorporation and before the ordinance requiring the pavement referred to, the company had executed a mortgage, which was sought to be foreclosed. The court decided that the claim was not valid and that the city had no right to

require such pavement, quoting as authority therefor, Chicago v. Sheldon, 9 Wall., 50, and Railroad Company v. Hamilton, 134 U. S., 296. No elaborate opinion was filed. It appeared to have considered the question too well settled to require discussion.

In City of Philadelphia v. Hestonville M. & F. R. Co., 35 Atl. Rep. 719, Supreme Court of Pa., 1896, the same contention arose. The city sought to recover for the cost of paving portions of certain streets which the defendant was required to keep in good repair. The powers and duties of the company had been created by an act of 1859, and that act contained a provision subjecting the company to such regulation as might be made by the city council in regard to paving, repairing, grading, culverting of, and laying gas and water pipes in the streets over which the tracks of the company might extend. This provision was referred to as affording the authority for charging the cost of repaving to the defendant. The court said that that provision could not be construed to require the company to pave, but only to submit to such regulations as were necessary to enable the city to carry out necessary improvements. As to the claim that the requirement to keep the streets in good repair could be construed into an obligation to construct a new pavement, the Court said: "The phrase 'to keep the streets in good repair' means to uphold, to maintain, or preserve them in good condition." . . . "Whatever the style of paving might be at the time, the mode of repair must conform to it." . . . "What is now asserted is that the duty to repair includes the duty to replace with a new, an improved and more expensive style of pavement whenever the city shall so direct." And again, "The extent of the liability of the defendant under its charter of incorporation

is for the cost of repairs properly made to such style of pavement as may have been upon the several streets along which the railways ran when the notice to repair was given. The railroad undertook to make repairs in a way which was unsuited and insufficient, and is found by the court not to comply with the conditions of their contract; "that when a change of grade or improvement was to be made, the railway should be changed to conform to said grade or improvement. The borough authorities gave notice to the defendant that they were about to pave this street with block stone, and required them to put their tracks in repair to correspond with said proposed improvement."

The railroad did nothing and the city authorities lowered the street, put in Belgian blocks, and claimed to recover the cost of so doing. The Court said: "that they (meaning the railroad) were clearly bound, having neglected to make their track correspond with the improvement or change of grade, to pay for the expense of lowering their whole track. We are not prepared to say—on the contrary, we instruct you that it does not follow—that they were bound to pave with Belgian block stone. We leave that to you as a question of fact to determine. The borough council had a right to pave with Belgian block, or asphalt, or anything else, the portion of the street on each side of their track, going within a foot of it, and require that the railway company keep its share of the street in good repair, in reasonable correspondence with the balance of the street, having proper regard for the travel on the street. If they had reduced their track to the proper grade, and had it in good repair for travel, then they were not bound to pay for any part of the expense. If they had neglected to do this and refused to do it, then they are liable for the cost of reasonably reducing this track to

the proper grade, and for the reasonable repair to keep it in the condition that the company had agreed to keep it in; namely, 'to keep in good repair that portion of the streets between the tracks and a space of one foot on each side thereof.'" . . . "If it was necessary to do it by putting in block stone on each side of each of the rails, then that cost would be the necessary and reasonable expense, and then, if it were necessary to have something filled in, in the balance of the ground between the tracks, also the cost of that. If you find that the reasonable way of repairing, and the cheap way in the end for the railway company, was to pave it with block stone clear through, the cost of that would be the reasonable and proper expense. Now, those are questions of fact for you to determine and as you find the facts you will find the verdict." The jury found a judgment for the plaintiff. The same rule was laid down in the recently decided case of City of Reading vs. United Traction Co., 64 At. Rep., 446.

This case appears to lay down the reasonable rule as to when the obligation to repair may be construed into an obligation to repave. If it appears that to repave with the same style of pavement as that ordered by the city is the proper and the best form of repair, as in many cases it would be, then it is possible that the city may require such repavement as a method of repair and as a compliance with the obligation so to do. It is conceivable that in some cases where the safety of the public requires such repavement between the tracks in order to make the highway safe and to prevent that unevenness of surface which would be a danger and inconvenience to travel, that the city may then require such repavement under the exercise of the police power, aside from any obligation contained in the charter

of the corporation, but that is a totally different thing from saying that the city may require the repayment of the expense of such repavement in any event, independent of the question of whether it is a proper repair or not. It must be apparent, in order to support an order for repavement or an assessment for that purpose, that such repavement was necessary as a repair; or that the authorities have either directly found that fact, or that their action is such as to show by necessary inference that such judgment was involved. In such case, it may be that the finding of the public authorities may have binding weight, presumptively, upon the court, but that is an entirely different thing from saying that an obligation to repair necessarily implies the duty to repave under all circumstances, whenever and as often as the city sees fit to order it, especially when it appears and is directly found by the court, that the particular pavement is not suited, and, so far from being a proper method of repair, increases the burden.

In this case the court can easily see that an asphalt pavement is unsuited to the conditions, as the court finds. The proper method would have been to put some more solid material between the rails and on either side thereof, which could not be cut up, as the asphalt pavement has been.

In this case, the finding is conclusive that this pavement was not a legitimate method of repair. (Record, page 73, paragraph 36.)

The act as construed in this case violates the contract of the railroad contained in its franchise and takes its property without compensation, because it is injured and its obligation to repair made more burdensome by the act in question.

It is perfectly plain that the legislature, in the Act of 1895, and that the common council in its action in imposing this

assessment, were not considering the necessity of repair and were not acting, in imposing this burden upon the railroad, in pursuance of the duty to protect the public from danger, but were attempting to impose upon an individual a part of the burden of discharging its public duty to construct and maintain highways, and to relieve the city to that extent from such burden. This is not an exercise of the police power but can only be done under one of the branches of the taxing power, that is, the power of making general or special assessment.

As illustrating the same distinction, see Borough of Norristown v. Norristown Pass. Ry. Co., 148 Pa. St., 87; 23 Atl. Rep., 1060, although the facts of that case are very different from the present one.

These various cases show conclusively that the law of Pennsylvania is against the contention made by the defendant in this case. The question has arisen more indirectly in other cases and been settled in accordance with the views of the railroad company in this case as to the construction of the word repair, and as to the right to require repavement under the police power.

As to police power in such cases, see Baltimore v. Scharf, 54 Md., 499; Oshkosh St. Ry. Co. v. Winnebago County, 89 Wis., 435; 61 N. W., 1107; Parmelee v. Chicago, 60 Ill., 267, which quotes with approval Chicago v. Sheldon, 9 Wall., 50. See also City Railway Co. v. Citizens Railroad Co., 166 U. S., 557; 41 L. ed., 1114; also Northwestern Telephone Exchange v. Minneapolis, 53 L. R. A., 175.

E.

This case is complicated by some statements of the court as to what questions it considered as really before it. In

order to fully understand the meaning of these remarks it will be necessary to refer to the history of the case.

It is unfortunate in some respects that the constitutional questions came before the Connecticut Supreme Court on the first hearing on a bill of exceptions by the appellee, the present plaintiff in error, and did not assume such prominence in the case as they would have had if made in the ordinary way; that is, as a ground of direct attack upon the judgment. The dominant question before the court at that time was the question whether the Act of 1899 had repealed *in toto* the Act of 1895, as was held by the Superior Court. The grounds of appeal of the then appellant and the opinion of the court show that that was the main question considered. Although the questions raised by the bill of exceptions were legally before the court, it gave but a small portion of its opinion to them, and, as we claim, the opinion itself, coupled with the authorities upon which it is claimed to be based, show that the court did not give that mature consideration to the questions which it would have done had they been presented more prominently. (See opinion of the Supreme Court on the first hearing, pages 13 to 21.)

The court, however, seems to have considered itself bound on the second hearing by its rulings made on the first hearing and gave no further consideration to the main constitutional questions. Judge Prentice says in the third opinion, on page 199, "Upon that appeal (meaning the second appeal) we reaffirmed without discussion our former rulings."

On the second trial, however, certain points were urged with new arguments and considerations, and particularly the case of Fielders v. The North Jersey Street Railway Company, 53 Atl. Rep., 404. It was also again urged that the inclusion of the cost of repair in the assessment made it

invalid. It is the belief of the plaintiff, and we think an inspection of the Record will show that the court really changed its mind on some of the questions which it had ignored practically, or to which it had given but little attention on the first hearing, and explained to itself this change of view on the ground that the claims which had really been made had not been made on the first appeal.

The court, in its second opinion, asserts that the following claim is a new question, to wit, "because said assessment includes the cost of keeping said pavement in repair, and said amount is not separate or separable from the general assessment, and because said cost of repair cannot be made a legal basis of assessment against said railroad, but should be paid from general taxation."

These remarks show how little attention was given by the court to the bill of exceptions on the previous appeal, and the same statement is again reiterated in paragraph 7, page 109 of the Record in the third opinion. Paragraph 8 of the bill of exceptions on page 74 in the first appeal is almost word for word the same as quoted in the court from the assignment of error on the second trial as a new question, and the appeal of the defendant on the first trial, section 54, page 56, shows that the defendant then understood this claim to be involved and distinctly attempted to answer it. So that it clearly appears that the court was mistaken when it stated that the claim that the assessment was void because it included the cost of repair was new to the case. It was perhaps new to the mind of the court because it had paid little attention to the bill of exceptions on the first hearing.

Another claim was made in the case that the assessment was invalid because it included certain items named in Exhibit 6, page 70 of the Record. (See claims of the defendant,

paragraph 53, page 56, and paragraphs 30 and 31, page 52.) This claim is distinctly stated in complaint (see paragraph 12, page 28). The remark of the court in its first opinion on page 21 of the Record, that "incidental objections are made by the plaintiff and discussed in the briefs of counsel, to the assessment made by the city, to wit: (1) That it was without due notice to the plaintiff, and (2) that it included items of expense not involved in the cost of paving the eighteen feet of width chargeable to the plaintiff." And the reference of the case to the Superior Court for the deduction of improper items referred to the items in this Exhibit 6 and not to the cost of repair, which amounted to something over $3,500, and which was made a distinct ground of appeal and discussion, cannot be doubted.

Judge Shumway, the judge of the Superior Court, so understood it as is evident by his judgment in the case, and did not understand it as referring to the element of repair, which raised a distinct legal question upon which many authorities were cited.

On the second appeal the plaintiff not only urged the invalidity of the Act of 1895 as it affects the railroad, but also urged the invalidity of the method of enforcement of the act, and claimed that even if the Act of 1895 was constitutionally valid, the assessment itself might be unconstitutional.

The Court in its opinion in the second hearing uses the following language:—

> "Other claims new to the case are made, to the general effect that as the street had been paved twenty-three years before and the plaintiff had been assessed a portion of the cost thereof, and especially as the city had not shown the need of the new pavement as a means of repair, an unconstitutional

use of the Act would result if the present charge against the plaintiff was enforced. These claims have no foundation either in the application or pleadings and therefore have no standing in the case. We do not hesitate to say, however, without discussion, that in view of the pleadings, which did not put the defendant to the proof of the necessity of the new work as a means of repair and proper maintenance of the street, the facts indicated could not be held sufficient to accomplish the results claimed for them."

And again, in its last opinion on page 112 of the Record, it uses the following language:—

"The plaintiff, in its brief, asks us to define more clearly than was done in our last opinion the claims which come within the ruling then made as hereinbefore stated in paragraph 10 of the resumé of our rulings. If any more precise statement could be deemed necessary, we would say that we intended to include any claim that the assessment, if confirmed, would, under the circumstances of the present case, be, either in whole or in part, the result of an unlawful and unconstitutional exercise of the legislative power, for the reason or reasons that the whole or a portion of said street had once been paved, the plaintiff being assessed and paying a part of the cost thereof; that the defendant had not shown the propriety or need of the repavement as a measure of repair; that it had not shown that some proper public authority had passed upon that question, or other reasons peculiar to this particular work, and not arising from the general operation of the statute."

Section 11, page 74, which is as follows:—

"The plaintiff claimed that the repavement if required at all could only be required when it was found to be a satisfactory, or the most satisfactory, method of repair, which did not appear in this case,"

shows that this claim was distinctly made on the first hearing, and claim 51 of the defendant on page 56 shows that this claim was distinctly raised on the first hearing and discussed on both sides, although apparently ignored by the court.

Although rules of pleading are to some extent to be settled by the local courts and the decisions on these matters are not subject to review by this court, we do not understand that this court is precluded from inspecting the Record to see whether it is fairly precluded from the consideration of a question of constitutional law. We submit that the Record shows that it is not so precluded from examining the question, whether aside from the constitutionality of the statute of 1895 the assessment itself was an unconstitutional act. However that may be, the line of distinction is so narrow that even if the court is governed by that rule it does not seem to us to affect the fundamental question in this case. This distinction was obviously intended to relieve the case from the effect of the decision in Fielders v. The North Jersey Street Railway Co. above cited, which was first presented to the court on the second hearing, but it does not, in our opinion, accomplish that result. If the assessment is unconstitutional as an exercise of the police power because it was not preceded by any finding that the pavement was necessary as a repair, nor any consideration of that question, then the statute of 1895, which in terms compel the city to make such assessment without inquiry on that subject, is itself unconstitutional, and this question it is admitted was fairly and fully raised and considered by the court, and is conceded to be before this court on this writ of error.

It seems to the plaintiff that the distinction drawn by the court is an attempt to save its first and ill-considered ruling

from the effect of the opinion in the Fielders case, then for the first time urged upon it, by the use of a distinction without a substantial difference.

In this connection it is proper to consider another limitation suggested by the court as to its rulings, that is, that it did not intend to rule upon the question whether the assessment would be, under the circumstances of the present case, an unlawful and unconstitutional exercise of the legislative power for the reason or reasons that the whole of a portion of said street had once been paved, the plaintiff being assessed and paying a part of the cost thereof. (See Record, printed page 112.)

It will be noted that in the very first memorandum of decision of Judge Shumway, judge of the Superior Court (see pages 44 and 45) the fact is stated that "before the laying of asphalt West Chapel Street was paved with crushed stone, a part of the expense of laying of which had been paid by the plaintiff." (See printed pages 44 and 45 of the Record); and again on page 47 in the judgment it is stated, "before the laying of the asphalt pavement West Chapel Street had been partly paved with crushed stone and partly with Belgian block, and the plaintiff had been assessed under the head of benefits, and had paid a portion of the expense of the laying of said pavement." (See judgment of the court, printed page 47.)

Paragraphs 34 and 35 of the finding made for the purposes of appeal (printed page 53) set out these facts with much greater particularity, giving the amounts and details of the assessments. These facts constantly appear in the same form in the subsequent findings. (See paragraphs 34 and 35 on printed page 82.) Evidence on the subject was admitted against defendant's objection and the ruling made a ground

of appeal by defendant on the first appeal. (See par. 41, p. 55 and par. 22, p. 72.) It seems to us that the court must have overlooked the circumstances concerning these facts upon which this claim is based as embodied in the very first judgment of the court and thereafter appearing in all the findings.

Evidence on that subject "was offered by plaintiff to prove that the Act of 1895 AND ANY ASSESSMENT MADE THEREUNDER FOR THE WEST CHAPEL STREET PAVEMENT WAS UNCONSTITUTIONAL because it imposed unequal burdens upon the plaintiff company and other property owners, in that there was a difference made by the terms of the Act between those property owners who had prior assessments and those who had not, and no such allowance was made because of prior assessments upon the railroad company. The evidence was admitted, defendant duly excepting. (See paragraph 42, printed page 55 of the finding on the first trial.)

The defendant, City of New Haven, made this ruling a ground of special appeal (see paragraph 23, reason of appeal, printed page 72), but the court in its opinion ignored this claim. It seems to us that the statement of the court that the claim "that, as the street had been paved twenty-three years before and the plaintiff had been assessed a portion of the cost thereof," the present assessment was unconstitutional was new to the case and had no foundation in the pleadings, is the result of another oversight, as these facts were distinctly found and embodied in the judgment of the court after objection to the evidence had been overruled and the point raised as to whether such evidence was admissible. The court below could not without denying to the plaintiff due process of law and the equal protection of the law deny to it the benefit of a claim based upon the facts embodied in

the judgment on the alleged ground that they had not been definitely stated in the original pleadings, and particularly it cannot without depriving the plaintiff of due process of law and of the equal protection of the laws claim that by its conduct in any way it had waived any right to make this claim.

It seems to the plaintiff that the attempt to prevent the plaintiff from taking advantage of claims plainly arising on the face of the Record from the facts stated in the judgment of the court must fail, and that the plaintiff is entitled in this court to insist that if the judgment appears clearly to violate the constitutional rights of the plaintiff, it is in no way estopped from claiming its full rights. In any event, there is no suggestion that the plaintiff is precluded from making any claim which it may be entitled to make against the constitutionality of that part of the law of 1895 which affects the plaintiff, and the fact that that law compels the city to levy an arbitrary demand against the plaintiff for the amount of the pavement independent of the question whether such pavement was rendered necessary as a repair, and independent of the question whether it has previously paid for a pavement or not, is sufficient to cover the whole case and all the claims which are made in this writ of error by the plaintiff.

Section 2 of the Act of 1895, quoted on page 3 of this brief, provides that land owners shall be assessed at a certain rate where no pavement has previously been laid, and at a certain rate where a pavement had been previously laid and an assessment made. It provides, however, that the railroad shall be assessed and shall pay for the space of nine feet wide for every line of track and makes no allowance whatsoever for any previous assessment. It is our claim that the act is unconstitutional for the reason that it makes no such dis-

tinction or allowance and that it enforces the liability independent of the question of whether the pavement is necessary and useful as a repair, or whether, as in this case, as alleged in paragraph 13 of the complaint, page 29, and as found by the court, it renders the work of repair more difficult and expensive and is unsuited to the conditions of the case and an absolute injury to the railroad.

POINT II.

The other ground upon which the lower court supports its judgment is the power of amendment, but the Act of 1895 as affects the railroad cannot be supported on this basis.

The court sanctions the declaration, in Inland Fisheries v. Holyoke Water Power Co., 104 Mass., 446-451, that such amendments "must not defeat or substantially impair the object of the grant, or any rights which have vested under it."

The Act of 1895, as claimed by the city, authorizes it to impose upon the railroad the burden of paying any expense which it may see fit to incur for the paving of the space between the tracks and two feet on each side. The railroad has no right to do the work itself, it has nothing to say concerning the contract which should be made, whether profitable or otherwise, and it has nothing to say as to the nature of the pavement to be laid down. The pavement may be removed as often as the city sees fit, and the railroad, therefore, must pay such expense as often as the city sees fit to impose that expense.

In this case the pavement is, as the court finds, unsuited to use in a street where there is a street railway. It is a damage to the road, as it increases the cost of maintaining and operating the railroad, and makes more expensive and

difficult the keeping of that portion of the road between the tracks and two feet on each side in repair, so as to comply with the obligations which are imposed upon it by public law. To say that such an act does not defeat or substantially impair the object of the grant, or any rights which have vested under it, seems to us a strange assertion.

In this case the obligation imposed is over $36,000 for less than a mile of track. Such a burden would be amply sufficient to bankrupt a street railway if extended, and particularly if it were several times repeated. Whether or not the road shall be thus bankrupted is entirely at the discretion of the city. To saddle the company with this burden is certainly to defeat or impair the value of its property and franchises.

The only way of avoiding the proposition that this act does defeat or substantially impair the object of the grant and the rights which were vested under it, is by adopting the principle that the legislature has the right to impose this burden under the police power. If this act is within the police power, then it is a valid act, no matter if the charter were closed or open to the power of amendment. In that case, it does not defeat or impair the value of the property or rights of the railroad, because such property rights are subject in all cases to the police power. All charters and all property are subject to the exercise of the police power.

The question of the validity of the amendment, if it is to be treated as an amendment, would depend upon the question whether it is called for in the public interest; that is, whether it is a valid exercise of the police power. The real question centers itself therefore on the police power. It is well recognized that the legislature cannot, under guise of this power of amendment, take the property of a corporation.

The authorities cited in the opinion of this court under the head of amendment, as it seems to us, do not support this act in question.

The case of Inland Fisheries Co. v. Holyoke Water Power Co., 104 Mass., 446, which was appealed to the Supreme Court and finally decided in the case of Holyoke v. Lyman, 15 Wall., 500, and the case of N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S., 556, have been sufficiently considered in Point C.

It is indeed difficult in some cases to decide whether an amendment may be justified or not, but it seems to the appellant that the rule concerning such amendments is not difficult to lay down. The power of amendment to a charter is designed to prevent the rights given by the charter from being used to the injury of the public. Such changes of conditions may occur that the exercise of such rights may be incompatible with the public interest, and it may be necessary either to repeal such rights or to impose further conditions upon their exercise, but we do not believe that any well considered case can be found wherein the doctrine is sanctioned that such a power of amendment authorizes the legislature to take the property of the company, including its money, for money is property, directly, and where it is not necessary to limit or condition the exercise of the charter powers for the public good.

An act imposing a burden *in invitum* is, as has been said, *"strictissimi juris,"* and must be considered according to its words and in the connection in which it is found, unless there is something in the act which plainly requires some different interpretation. The power to amend or repeal charters, even where such power is reserved in the charter of the corporation, is not unlimited. Such a clause in the char-

ter of the corporation, that is allowing repeal or alteration, must not be interpreted as giving the legislature power to take the property of the railroad without compensation and without due process of law. It does not remove such property from the protection of the law.

Lake Shore & Michigan S. R. Co. v. Smith, 173 U. S., 684.

This question of the extent and limitation of the power to alter and repeal came under consideration in the above case. Mr. Justice Peckham propounded the question as follows:

"How far does the authority of the legislature extend in a case where it has the power of regulation and also the right to amend, alter or repeal the charter of the company, together with the general power to legislate upon the subject of rates and charges of all carriers? It has no right, even under such circumstances, to take away or destroy the property, or annul the contracts of a railroad company with third persons, citing under that head, Greenwood vs. Union Freight R. Co., 105 U. S., 13, 17 (26 L. ed., 961, 964); Commonwealth vs. Essex Co., 13 Gray, 239; People vs. O'Brien, 11 N. Y., 1, 52 (2 L. R. A., 255); Detroit vs. Detroit & H. Plank Road Co., 43 Mich., 140."

The direct question involved in this case was the constitutionality of a Michigan statute requiring railroad companies to keep on sale one thousand mile tickets to be sold at the rate of $20, which was less than the ordinary rate. The court held that such a regulation was unconstitutional and was taking the property of the corporation without compensation; that the power to regulate the maximum charge did not include the power to make a distinction in favor of certain persons, that is, persons who bought tickets by the wholesale. As regards the claim that the reservation of the

right to alter or amend the charter of the corporation included the right to make provisions of this character, it said:

"To terminate the charter and thus end the legal life of the company does not take away its property, but, on the contrary, leaves it all to the shareholders of the company for the payment of its debts."

"A railroad company, although a *quasi* public corporation, and although it operates a public highway (Cherokee Nation vs. Southern Kansas Railway Co., 135 U. S., 641, 34 L. R. A., 295; Lake Shore & Michigan Southern Railway Co. vs. Ohio, 173 U. S., 285, 301, ante 392) has nevertheless rights which the legislature cannot take away without a violation of the Federal Constitution, as stated in Smith vs. Ames, 169 U. S., 466, 544. A corporation is a person within the protection of the 14th Amendment. Minneapolis & St. P. L. R. Co. vs. Beckwith, 129 U. S., 26, 32 L. R. A., 585; Smyth vs. Ames, 169 U. S., 522, 526, 42 L. R. A., 840."

"Although it is under governmental control, that control must be exercised with due regard to constitutional guarantees for the protection of its property."

The best illustration, perhaps, of this limitation of the power to repeal a franchise is found in the case of People of the City of New York v. John O'Brien, Receiver of the Broadway Surface R. R. Co., 111 N. Y., 1, 2 L. R. A., 255. It will be remembered that the right of the Broadway Surface R. R. Co. to construct a railroad on Broadway was given by the board of aldermen of New York, under the power given them to authorize such construction, but the grant was supposed to have been obtained by corrupt influence, in which, if we recollect rightly, a certain person known as Jake Sharp figured very prominently. The legislature passed an act repealing the charter of the Broadway Surface R. R. Co., and also attempted to destroy the franchise of laying and operating the railroad in the street. The court decided that although they might repeal the charter of the company, there was no right to take away from the stock-

holders and mortgage bond holders the property right in the franchise, and that the franchise, therefore, could not be destroyed by the legislature, because that involved the taking of property of the company without due process of law, and impaired and violated the obligation of the contract.

A claim similar to the one made by the defendants in this case was made in the case of State v. Haun, 61 Kan., 146, 47 L. R. A., 369; 56 Pac., 340, where

"there was presented for consideration a statute providing for the payment of the wages of laborers in money, coupled with this provision in section 4: "Sec. 4. This act shall apply only to corporations or trusts, or their agents, lessees, or business managers, that employ ten or more persons."

The act was held unconstitutional. After referring to an alleged defect in the title, the Court said (47 L. R. A., p. 372):

"We have no hesitation in saying that if this statute had, without defect as to title, clearly and in express terms amended corporate charters, retaining the section classifying corporations to which it was applicable by the number of men in their employ, it would be obnoxious to the 14th Amendment to the Constitution of the United States."

See this case also cited in the case of Cotting v. Goddard and Kansas City Stock Yards, etc., 183 U. S., 79.

If the assessment complained of would be invalid if the railroad were owned by an individual, it derives no support from the fact that the owner of the railroad is a corporation whose charter is subject to amendment. R. R. Co. v. Ellis, 165 U. S., 150; Detroit v. R. R. Co., 43 Mich., 140.

As regards the power to exact pecuniary charges, the property of a corporation is protected by all guarantees that apply to any property of any private individual.

This Act of 1895 is a bare-faced attempt to impose upon the railroad an enormously burdensome obligation, without

any excuse whatsoever, except the desire of the public to raise money for discharging its duties.

The special charter obligations of this company concerning repair are as follows:—

The original charter of the company was passed in 1860 (Private Acts of 1860, p. 370). It provides, in section 9: "Said company shall keep the portion of the streets, or avenues through which their road or way shall be laid down, with a space of two feet on each side of their track or way, in good and sufficient repair, without expense to the town of New Haven, or the owners of land adjoining said track or way." Section 13 provides that this act may be amended or repealed at the pleasure of the general assembly.

In 1862, an act was passed (Private Acts of 1862, page 499) upon the petition of certain citizens of New Haven, not of the road, authorizing the company to lay tracks from the intersection of York and West Chapel streets, westerly through West Chapel Street to Norton Street, which is the locality affected by this case. Section 20 provides as follows: that "Said Company in constructing and laying down their road as herein provided, shall be subject to all the provisions of Section 9 of their charter." Section 9 is the one already quoted concerning repair of highways.

This Act of 1862 does not contain the usual clause in regard to repeal or amendment, which is attached, however, to the other enactments, giving power to operate the road through other streets. There is a question whether any special effect is to be given to the circumstance that this act was not made subject to amendment.

Section 164 and section 165 of the Revision of 1854 were presumably then in force, (see page 206 and page 207) and

may possibly be read into the Act of 1862. These acts are as follows:—

> "Sec. 164. All acts and resolves creating corporations or altering the charters of corporations previously existing, that have been, or that shall be passed by the general assembly, and the charters of all corporations hereafter granted, and under which no corporations have yet been organized, shall be subject to alteration, amendment and repeal, at the pleasure of the general assembly, unless such acts and resolves by the express terms thereof, are declared to be not subject to such alteration, amendment, and repeal.
>
> Sec. 165. Whenever any amendment or alteration of the charter of any corporation shall be made, if it be not otherwise specially provided in the resolve making such alteration or amendment, the same shall not become operative, unless within six months after the passage thereof it shall be accepted at a meeting of said corporation legally warned for that purpose, and unless an attested copy of said acceptance shall be lodged on file in the office of the Secretary of State, to be recorded by him in a book kept for that purpose, for which recording he shall be entitled to receive the sum of twenty-five cents; and such acceptance shall operate to make the original charter and all resolutions amending and altering the same, subject to amendment, alteration and repeal, at the pleasure of the general assembly."

Furthermore, neither the Act of 1895 nor that of 1899 purports, in the slightest degree, to amend the appellant's charter. The appellant is not even named in either act. Their object and purport were to amend the charter of the City of New Haven and not that of the appellant.

It will be observed that the Private Act of 1862, page 499, which is the one under which our rights in this case exist, is not by its terms made in any way subject to amendment

or alteration. It is, as far as that act goes, the grant of an irrevocable franchise. The only provision affecting the question is that of section 164, providing that resolves creating corporations, or altering charters of corporations, shall be subject to alteration, amendment, or repeal.

The question is whether that section affects a distinct grant of a property right or franchise to a corporation, and whether that does entitle the legislature to attach to the exercise of that franchise, or the enjoyment of that property, a very heavy and onerous condition not justified under the taxing power or under the police power.

Whatever may be the difficulties of defining the limits of the right of amendment, we believe this is a safe and conservative statement, that the legislature cannot, under the ordinary power to repeal or alter a charter, impose a heavy pecuniary burden, which it is not authorized to impose under the police power or the taxing power. If it is so, then the legislature, by virtue of such power of alteration or amendment, has a right at will, to injure and destroy all rights of property which may have originated in any grant made by it. This, the authorities say, cannot be done, and this court has itself so said, as we understand, in its previous opinion in this case. See also People v. O'Brien, Receiver, 111 N. Y., 1, 2 L. R. A., 255. See Record, p. 20.

This Act of 1895 and the assessment thereunder, if justified at all, must be justified under the police power pure and simple, and we claim we have shown that it cannot be so justified.

Several other claims were made by the defendant city in the lower court which, as we understand it, are not open again for discussion here, as they were not sustained by the lower court and do not form a basis of the judgment which

we seek to have set aside. But as it is possible that the defendant may seek to reopen them again, notwithstanding they have been repudiated by the court below, we append hereto the authorities and arguments which were used in the court below. These claims are (1) that the assessment could be supported as an exercise of the taxing power, and (2) that it could be supported as a mere change in the form of the obligation to repave.

F.

The Act of 1895, if any portion of it is still in force, would be unconstitutional and void as applied to this case, inasmuch as it purports to make an assessment arbitrarily and without any ascertainment of benefits.

The Supreme Court of Connecticut was right in declining to sustain this assessment as an exercise of the taxing power. The Connecticut courts have always been stringent in supporting the rule that a special assessment cannot be supported without actual proof of benefit.

It is not necessary to claim here that an ascertainment of benefits by any particular tribunal is necessary, but there must be some ascertainment of benefit in some way. The legislature itself may ascertain that fact. Where the act is such that it may be fairly supposed that the legislature had in mind the facts of a particular case, and did pass upon the facts of the case, although without expressly stating so, some presumptions might be indulged. But in this case, the legislative act is such that it apparently excludes all idea that there has been an actual finding of benefit. The legislature did not have in mind the situation of any particular case.

It cannot be presumed that a change of pavement will be in all cases a benefit to the railroad or the property owners.

(See People, ex rel. Davidson v. Gillon, et al., 126 N. Y., 147, infra.) In fact, it might be, as in this case it appears to be, quite the contrary. The pavement might be a good thing for the general public on account of the street being a business thoroughfare, and in many ways, by the noise, dust, increase of traffic, necessity of repair, etc., might be an injury to the railroad company and to property owners.

It cannot be supposed that the legislature found, nor could they in fact find, as a universal conclusion, that all repavement in any case, no matter what the existing conditions might be, would be beneficial, and beneficial to a certain absolute proportion of the cost of such pavement.

That special assessment can only be based upon special benefits accrued, and is valid only to the extent of such benefits, that the procedure for assessment must be such as to ascertain, or such as can be presumed to ascertain, such benefit, has been established by an overwhelming number of authorities, too numerous for citation in this brief. Among them are the leading cases of:

State, Agens. Plff. v. Newark, 37 N. J. L., 417; 18 Am. Rep., 729.

In re Washington Ave., 69 Pa. St., 352, 8 Am. Rep., 250.

Bogert v. Elizabeth, 27 N. J. Eq., 568-70.

Chamberlain v. Cleveland, 34 Ohio St., 561-2.

Thomas v. Gain, 35 Mich., 156.

In Crawford, et al. v. People, 82 Ill., 557, the court says, in considering the matter of local assessment:

"It is a well established doctrine in this Court that property can only be assessed for public improvement on the principle of benefits received by the property by the construction of the work and that the assessment should never exceed the benefits conferred, and it is essential that it shall

appear from the proceedings themselves that such was the principle upon which the assessment was made. Grady v. People, 60 Ill., 19."

In People ex rel. Davidson v. Gillan, et al., 126 N. Y., 147, the Court of Appeals says:—

"It cannot be said as a matter of course that street railways are benefited by repavement of the streets through which they are laid, and if they are not so in fact, it will be contrary to the general policy of the law to tax them with the expense of such improvements." Again, on page 157, the Court says, "It is doubtless possible to conceive of a case where such a pavement might be a benefit to a horse railroad company, but we do not believe it can be so in any case except exceptional circumstances make it so appear."

A long course of decisions has established the rule in Connecticut that there can be no special assessment without benefit and that it can only be sustained to the extent of that benefit, as ascertained by inquiry.

In the case of City of Hartford v. West Middle School District, 45 Conn., 462, land of a school district was assessed for the expense of laying out a highway. The court held that the assessment could not be supported, although the lands of the school district bordered on the street, and Judge Granger uses the following language in rendering the opinion of the court:—

"To render an assessment legal and valid it must appear that the benefit is direct and immediate and not contingent and remote,"

citing City of Bridgeport v. New York & New Haven R. R. Co., 36 Conn., 255; New York & New Haven R. R. Co. v. City of New Haven, 42 Conn., 279. In the case cited in the 42d Conn., an assessment was sought to be justified upon the property of a railroad company occupied by a depot, the benefit being supposed to arise from the paving of the

street. It was held that whatever benefit there was in that case was remote and not direct, immediate and certain, and that, therefore, the assessment could not be sustained. The court say that the land could not be thrown upon the market, but would be occupied for a depot, and also,

"that the benefit resulting from this improvement, that is, paving, is not permanent, but will in time cease to exist; probably before the appellants can experience any practical advantage from this pavement, it will have given place to other improvements, so that the supposed benefits are in fact inappreciable."

In the case of Park Ecclesiastical Society v. City of Hartford, 47 Conn., 89, it appeared that the charter authorized the common council to assess the whole or any part of the expense upon the persons whose property is, in its judgment, specially benefited; the ordinance directed the whole of the expense to be assessed upon the adjoining proprietors. The Court says:—

"Of course, ordinances will not be so interpreted as to require assessments without or in excess of benefits. With that limitation, we see no objection to them. They may well apply to all cases where the benefits exceed the assessments. Should a case arise in which the benefits are less, then the objection now urged would have more force."

In the case of Farmers Loan & Trust Co. v. Borough of Ansonia, 61 Conn., 76, an assessment upon a horse railway for a portion of the cost of a pavement was sought to be justified on the ground that the charter of the company required it to maintain in good and sufficient repair that part of the highway occupied by its tracks and a space of two feet on each side, and the committee stated that the assessment rested, not so much on the ground that its property had been enhanced in value, as that the borough had done

certain work that the company is legally bound to pay for. The court held that the assessment was illegal because it had omitted to find that the property in question had been enhanced in value by the improvement in the street and because it rested the assessment upon the ground that the borough had done work which the railroad company, under the provisions of its own charter, was bound to pay for, and third, because it placed the assessment upon the increased value of the franchise of the railroad company.

In Clapp v. Hartford, 35 Conn., 66, it was decided that although a front foot rule might be for some purposes fair, yet it must give way to the circumstances of the case, and where they were such that no benefit could be received, an arbitrary assessment would not be sustained.

In the case of Poillon, Prosecutor v. Mayor, etc., etc., of Borough of Rutherford, N. J., 47 Atl. Rep., 439, it was decided that to justify an assessment it must affirmatively appear that the assessment is not in excess of benefits received.

In Ferguson v. Borough of Stamford, 60 Conn., 432, Judge Carpenter uses the following language:—

"Assessments for other than special benefits have never been sustained in this State." (p. 445.)

And again (p. 446):—

"Betterments may not be assessed upon those who are only benefited as members of the community at large; they may not be assessed to an amount greater than the amount of benefits conferred; and, like all other taxation, they should be apportioned as far as possible equitably among all who are in like manner interested. Now when the legislature authorized this borough to make this assessment, it will be presumed that it contemplated only assessments under the conditions, limitations and qualifications above referred to. The decisions of this Court clearly justify this view."

In Trinity College v. City of Hartford, 32 Conn., 476-7, the Court uses the following language:—

"There are obviously three classes of benefits that may result from the opening of highways; one, the general benefit which the public as such receive from the opening of a new avenue of travel; another, the special benefits which those receive who reside or own land upon the new highway, in the more convenient access that is given to their lands; and another, the strictly local benefit which land as such may receive from the opening and construction of the road; an illustration of which would be drainage, if it should happen to be drained by the road and its ditches, or the filling up of the low ground by surplus earth which has to be disposed of in lowering some neighboring hill. As to the character of these classes of benefits, and as to their general relation to the road with reference to the questions of assessment and damage, there seems to be no serious difference between the claims of the parties. The mere public benefit cannot be assessed at all, and is only to be considered with reference to the question how much of the expense of the road shall be paid by general taxation."

In Nichols v. Bridgeport, 23 Conn., 203, the Court uses the following language:—

"If the assessment has been truly and justly made, the fact must be regularly ascertained to be what the theory of the proceeding supposes it to be, viz., that the party whose money is taken is locally and peculiarly benefited over and beyond the ordinary benefit which, as one of the community, he receives in all public improvements, to the precise extent of the assessment."

We also cite New London v. Miller, 60 Conn., 112.

In Norwood v. Baker, Supreme Court of the United States, October, 1898, 172 U. S., 269, the question of the constitutionality of a special assessment came up. The law of Ohio authorizes the assessment for the expense of certain public improvements to be laid either in proportion to

benefits or in proportion to the front feet. The action of the village directed the whole expense, including the expense of taking the lands incident to the extension of an avenue, to be assessed upon the abutting proprietors per front foot. The court held that this was an unconstitutional act, as taking the property of a petitioner without due process of law and also taking without compensation, and awarded an injunction. They said also that it was unnecessary to prove that the property was not benefited to that extent; that the whole proceeding was void, inasmuch as it did not provide any method of ascertaining the benefits; that a special assessment in excess of the amount of special benefit was unconstitutional and void and the rule by which the assessment was made must be one capable of doing justice; and the opinion holds that it was not necessary to tender any amount as a condition of getting an injunction. Judge Harlan, in rendering the majority opinion, uses the following language:

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the benefits accruing to him, is, to the extent of such excess, the taking under the guise of taxation of private property for public use without compensation. We say substantial excess because equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a Court of Equity when its aid is invoked to restrain the enforcement of a special assessment."

And again,

"It is admitted that the legislature may prescribe a rule for the apportionment of benefits, but it is not conceded that its power in this regard is unlimited. The rule must at least be one which it is legally possible may be just and equal as between the parties assessed. If it is not conceivable that the rule prescribed is one which will apportion the burden

justly, or with such proximate justice as is usually attainable in tax cases, it must fall to the ground, like any other merely arbitrary action which is supported by no principle." This language is quoted with approval from the Tidewater Co. v. Coster, 18 N. J. Eq., 519; 90 Am. Dec., 634.

And again Judge Harlan uses the following language:—

"As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefit. The assessment was by the front foot and for a special sum representing such cost, and that sum could not have been reduced under the ordinance of the village even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one."

It has sometimes been claimed that the case of French v. Barber Asphalt Paving Co., 181 U. S., 324, has overruled the Norwood case. But such is not the opinion of the Supreme Court itself in the French case. A little attention to the facts of the case will show how groundless is the assertion that under the French v. Barber Asphalt Co. case, any kind of an assessment, no matter how arbitrary, can be supported. This was an action instituted by a contracting company, the Barber Asphalt Company, which company had laid a pavement against French and others, owners of lots abutting on the street. The law under which the work was done was found in the Kansas City charter, and provided that whenever the common council should adopt a resolution declaring the work of paving a street with a pavement of a definite character to be necessary, which resolution should be

first recommended by the board of public works of the city, that that resolution should be published for ten days in a newspaper doing the city printing; that a majority of the owners of front feet on that part of the street to be improved had then the right under the charter within thirty days after the first day of the publication of the resolution to file a remonstrance with the city clerk against the proposed improvement and thereby to divest the common council of the power to make the improvement; and such property owners had the right, by filing within the same period a petition to do so, to have such street improved with a different kind of material and in a different manner from that specified in such resolution. In this instance, neither such remonstrance nor a petition was filed and the court of common council, upon the recommendation of the board of public works, enacted an ordinance requiring the construction of the pavement. The charter requires that a contract for such work should be let to the lowest and best bidder. Thereupon, bids for the work were duly advertised for and, the plaintiff company being the lowest and best bidder, the contract was entered into between Kansas City and the plaintiff for the construction of said pavement.

The tax bill representing the assessment against each lot owner was by the charter made a lien upon the tract of land against which it was issued and was *prima facie* evidence only of the validity of the charge represented by it. Such lien could be enforced only by suit in a court of competent jurisdiction against the owners of land charged brought by the contractor. No personal judgment was authorized to be rendered against the owner of the land. The right was expressly conferred on the owner of reducing the amount of the recovery by pleading and proving any mistake or

error in the amount of the bill, or that the work was not done in a good and workmanlike manner.

The work done consisted of paving with asphalt the roadway of Forest Avenue in the said (Kansas) City, thirty-six feet in width, from Independence Avenue to Twelfth Street, a distance of one-half mile. Forest Avenue is one of the oldest and best improved residence streets in Kansas City, and all the lots abutting thereon front the street and extend back therefrom uniformly to the depth of an ordinary city lot to an alley. The lots are all improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated with respect to the asphalt pavement. The structure of the pavement along its entire extent is uniform in character and quality. There is no showing that there is any difference in the value of any of the lots abutting upon the improvement.

It further appeared that acts of this sort had been repeatedly sustained by the Supreme Court of Missouri and had been the established method of making an assessment for a period long before the adoption of the 14th Amendment of the Constitution of the United States.

The difference between such an act as this and the Act of 1895, under which this assessment against the railroad is sought to be enforced, is sufficiently apparent. The Kansas City charter treated the lot owners on the street as a taxing district and left the matter to the vote of that taxing district as to whether they should have the improvement and, if they had it, what should be the nature of the improvement. It provided for full notice and particularly for expression of the opinions of the property owners. It provided also that there should be no personal liability, but

only a liability limited by the value of the property itself. It furthermore provided that the lien on the land should be collected by regular proceedings at law and that in these proceedings the character of the work and certain questions, at least, concerning the justice of the assessment might be investigated; and it is further found as a fact that the lots were of such a description and of such a character as would make the method of assessment by the front foot substantially just. It is not found that there was any practical injustice, or that the benefits were not equal to the amount of the assessment.

Furthermore, the action in the Barber case was not an action by the city to foreclose a lien, but an action by the contracting company which laid the pavement and which had been allowed to lay the pavement, and do the work, with the acquiescence of the owners of property, in full view of the law which provided that they should be liable for the expense in proportion to their frontage on the street. Certainly these property owners were apparently making no effort to remonstrate or to object, which by the charter they had a right to do, nor did they make any claim that any injustice had been done. They sought to resist the collection of the assessment to pay for the work. Was not such an attempt in that case inequitable and unjust and were not the property owners in such case estopped from setting up any objection, after having allowed the time to go by for raising it? Expressions in the opinions of courts must be understood in reference to the facts of the case, and substantially all that can be claimed for the Barber Asphalt case is that it decides that a law may be so framed with such provisions for notice and hearing as to provide for an assessment in accordance to frontage on abutting owners,

where the proceedings are such as to do substantial justice, and where it does not appear that any injustice has been done or that the benefits are not fully equal to the assessment, and where it also appears that the situation and condition of the property is such as to make such method of assessment apparently just and appropriate; where also the charge is not a personal claim, but only a lien upon the property claimed to be benefited.

Of the same nature is the case of King v. Portland, 38 Or., 402; 55 L. R. A., 812, and other cases which have followed the Barber case and which are cited in the brief of the appellant.

The difference between such an act as described in the Barber Asphalt case, and the Act of 1895, under which this assessment is sought to be justified, is apparent. The Act of 1895 is general. It provides for no vote or hearing of the property owners to be affected. They have no veto power upon the action of the city authorities in ordering such an improvement. The city orders the improvement presumably for its own benefit as a public matter, without necessarily any reference whatever to the interests of the railroad or the other property owners.

In the Kansas City act, no such improvement could be ordered, at least no assessment could be justified, unless the property owners, by their express action, or by their acquiescence, had admitted that the improvement was beneficial and desirable, and not only that an improvement but the particular improvement was beneficial. Furthermore, the Connecticut act provides for a personal claim. The language of this Act of 1895 is, "shall be assessed and shall severally pay" such and such a proportion of the cost of the pavement. The owners therefore, of the land, or the railroad, in the

case in question, may be made liable to pay more than the full value of the property alleged to have been benefited. Such cases have been known, that is where the cost of an arbitrary assessment might largely exceed the whole value of the property assessed, and might be a ruinous personal exaction on the individual who was unfortunate enough to own the property.

The person or corporation assessed under the Act of 1895 has furthermore no right whatever to be heard in the suit as to the character of the work done, or to the justice of the assessment. Even if the work was so badly done by the contractor that the pavement was worthless, a proportion of the cost, arbitrarily fixed by the statute, would be charged against the person or the corporation. Certainly, the Barber case and the cases which follow in the same volume of the United States reports, cannot be claimed as any precedent for such an act as the one under consideration. Particularly is that so where it appears, as it does by abundant evidence in this case, that so far from there being a benefit to the railroad, the pavement was actually a damage to its property.

No judgment of the Supreme Court of the United States and no other judgment of a court which is entitled to consideration in this state, has overruled the proposition laid down in Norwood v. Baker, that "in our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the benefits accruing to him is, to the extent of such excess, the taking under the guise of taxation of private property for public use without compensation. We say substantial excess, because equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it

be of a material character, ought not to be regarded by a Court of Equity when its aid is invoked to restrain the enforcement of a special assessment."

All that the Supreme Court has said concerning the rule in Norwood v. Baker is that the proposition above set forth did not necessarily invalidate all systems of assessment by the front foot, where such methods of assessment had been long established and where they were adapted to secure substantial justice, and it did not appear that injustice had been done in the particular case. Here, it does appear that this assessment, as regards the plaintiff, is not only in substantial excess of benefits received, but that it was absolutely without any basis of benefit whatsoever.

The Act of 1895 violates every possible rule of justice and every rule that has been laid down in the Supreme Court of the United States, or of Connecticut, for assessments. In the Barber Asphalt case and the other cases the Court refers, as an important consideration in the case, to the fact that the method of making assessments provided by the Kansas City charter was the established method in Missouri, which had been sanctioned by long practice, and it appears also that this practice had prevailed before the 14th Amendment had been adopted. They say that the 14th Amendment is not intended to overthrow the method of procedure sanctioned by long practice and legislation in the state. No such claim can be made for the Act of 1895. It is anomalous in all its features, contrary to the practice in Connecticut, and contrary to repeated decisions of the Supreme Court of that state, to which reference has been made in this brief.

See also White v. Gove, 67 N. E. Rep., 359; 10 Municipal Corporation Reports, 694 Supreme Court of Massachusetts, 1903.

G.

As to the claim that the Act of 1893 requiring the railroad to repair and the provisions of its charter on the same subject gave any authority for the exaction contained in the statute of 1895, or that the statute of 1895 was in any way to be justified as a change of the form of the obligation. This claim was strongly urged upon the Connecticut Supreme Court but not sustained. We do not suppose that this court will be disposed to reconsider it, or in fact that it can do so, but out of abundant caution we append to this brief the arguments and authorities on that subject. The discussion of this topic involves some repetition, as the authorities under this head have been largely quoted on the question of whether the exaction was justified under the police power. The legislative history of the Act of 1893 is as follows:—

This first appears as chapter 31 of the Act of 1863, entitled, "An Act Relating to Horse Railroad Companies;" sections 2 and 3 of said act, being the particular sections referring to the matter of repair are as follows:—

> "Sec. 2. Every horse railroad company which shall have constructed, or shall hereafter construct any horse railroad in the street or streets of any city or town in this State, shall be, and is hereby, required to grade and keep in repair the railroad track and railroad way, and the surface of such street or streets adjoining the rails of such railroad, for a space not less than two feet in width on each side of each rail, and to properly construct all crosswalks in such manner that carriages, wagons, and all other vehicles, can safely and conveniently cross and turn off from such track; and in case of injury to any person, animal or vehicle, arising from any defect in the grading or repair of such railroad, railroad track, railroad way, or of the surface of any street adjoining the rails of such railroad, for a space not less than two feet in

> width on each side of each rail, no action shall be maintained against such city, or town, for such injury.
>
> Sec. 3. That if any horse railroad company shall neglect or refuse to keep in good and proper repair its track, or any part thereof, or the crossings, or the surface of any streets within and for two feet adjoining each side of said track, the court of common council of any city, or the selectmen of any town, in which said horse railroad is located may order such company to put such track, roadway, grading or cross-walks, in good and sufficient repair, designating in said order the locality where said track, roadway, grading, or cross-walk, is to be repaired; and said company shall put such track, roadway, grading, or cross-walk, in good and sufficient repair, as soon as practicable; and if such company shall neglect or refuse, for the term of thirty days, to comply with such order of said common council, or selectmen, then said court of common council, or selectmen, may cause such order to be carried into effect by an agent, or agents, by said council or selectmen appointed, and the expense caused thereby may be collected from such railroad company, by any proper action, in the name and behalf of such city, or town."

This act continued in the same form through the general statute of 1866, secs. 550 and 551, p. 207; revision of 1875, p. 339, secs. 4 and 5; in the revision of 1875, the section concerning the keeping in repair is slightly condensed, but the meaning is the same; in sec. 5 is a condensation of the original section 551, which reads as follows:—

> "Sec. 5. If any company shall neglect to repair any track, highway, or cross-walk, as required in the preceding section, for thirty days after the common council or selectmen shall have ordered such repairs to be made, then such common council or selectmen may make such repairs, and the city or town, as the case may be, may collect the expense from said company."

With possibly trivial changes of phraseology, the same thing, in substance, appears again in secs. 3597 and 3598 of the Revision of 1888, page 794. All of these acts affect simply horse railroads. The electric method of traction did not make much progress in this state until after 1888. The change in method of traction seemed to call for a new act affecting all street railroads. Accordingly, we have the Act of 1893, chapter 169, applicable to street railways generally, repealing the old act and condensing the provisions of the old law into section 6, which embodies the subject of the duty of the road to repair, and which is as follows:—

> "Sec. 6. It shall be the duty of every street railway company to keep so much of the street or highway as is included within its tracks, and a space of two feet on the outer side of the outer rails thereof in repair, to the satisfaction of the authorities of the city, town, or borough which is bound by law to maintain such street or highway. But such authority shall not order said street railway company to use any better or more expensive kind of pavement or material for that part of the street or highway which it is the duty of such railway company to keep in repair, than is used by the town, city, or borough upon the remaining width of the street or highway, except for a space of one foot on each side of each rail, unless such better or more expensive kind of pavement or material was required in the order permitting the original location and layout of such railway on such street or highway. Every such municipal authority shall keep a record of all orders as to such repairs, shall serve a copy thereof upon the railway company, and such order shall state the time within which repairs are to be completed, which time shall not be less than thirty days from the service thereof; and upon failure upon the part of the company to make the required repairs within the time fixed by the order, such repairs may be made by the municipal authorities inter-

> ested, and the expense thereof recovered from the railway company in an action upon this statute."

And section 9 on page 311, Statutes of 1893, which contain the law concerning the responsibility of the railroad for injuries occurring from failure to comply with the provisions of section 6, which is as follows:—

> "Sec. 9. Any person injured in person or property by reason of any defect in that part of the street or highway which any street railway company is bound by law to keep in repair, may bring his action therefor against both such company and the town, city or borough which is bound by law to keep said street or highway in repair, and any judgment recovered in such action shall run against both of such defendants. Said railway company shall, however, pay such judgment and save the other defendant harmless therefrom, unless the court, or, if the case is tried to the jury, the jury, before whom the action is tried, shall find that such defect was due in whole, or in part, to the negligence of such city, town or borough, in which case the court or jury, as the case may be shall find and adjudge how much of the judgment shall be paid by the municipality without reimbursement from the railway company. The fact that the railway company has kept its said part of the street or highway in repair to the satisfaction of the municipal authority shall not operate to shift the responsibility for injuries occurring by reason of defects therein, from the railway company to the municipality."

The original statutes were passed in view of the well-known fact that the use of the streets for horse railways caused a change in the surface of the street. The passage of the horses dug out, or excavated, the track between the rails. The rails themselves, when raised above the surface, were, to a certain extent, an obstruction, and were liable to

cause ruts by the side of the rails, which might endanger vehicles. The law required the railroad to remedy these conditions wherever they occurred. In case they failed, on proper notice from the public authorities, to remedy any such condition, the authorities had power to make the repair themselves and charge the amount over against the railroad.

All this is the exercise of a strictly police power, the power to compel public corporations using the streets to so make use of its franchise as not to injure the public, and to remedy such injury as might result from the operation of the railroad. The law is not different in its objects and nature from those laws which require street railways to have fenders on their cars, to regulate their speed so as not to be dangerous to the public, and to those laws which require steam railroads to keep gates at crossings, or to raise or lower the level of the road at such crossings.

No unprejudiced person who was not a special pleader, and looking for an argument to support a desperate case, would extract from these statutes the proposition that the public authorities had any right to compel the railroad to pay for the construction of a pavement throughout, although such pavement might be unsuited to the conditions of the street railway, as in this case, and might render it impracticable to carry out the obligations of the statute concerning repair.

The object of the Act of 1893 is the same as the Act of 1863, and the obligation sought to be enforced is the same. There is nothing in the change of construction from horse power to electricity which justifies any extension of the burden. On the contrary, the injury from the use of the road by an electric railroad is much less than that by a

horse railroad, and in the case of the former is practically nothing at all.

The obligation imposed upon the railroad under the statute of 1893 and under the provisions of the charter does not necessarily include the right to require the road to repave the space between the tracks and two feet on each side. The statute of 1893, section 6, requires repair. There is a wide difference in theory and in practice between repair or maintenance and improvement. The distinction runs through the laws of the subject of assessment and is known, not only to the law but in practice, to all corporations and business enterprises. Maintenance or repair is keeping up to the existing condition. Improvement is an addition of value or condition. In a well managed corporation, maintenance or repair come out of income. Improvement may be considered a justification for the issue of bonds or of new stock. In municipal affairs, the maintenance and repair of highways and other municipal institutions is paid out of general taxation and from the general funds of the city. Improvement which adds to the value of real estate may be charged, to the extent of special and direct benefit, against property so benefited. This is a general rule, and although there may be exceptions in practice, the rule exists and is recognized.

Repavement is an improvement and not a repair. This proposition is accepted by all courts, as far as an extensive examination enables us to judge, except the State of Pennsylvania. In the case of Hammett v. Philadelphia, 65 Pa. St., 146, the Court said repaving was of the nature of repair and maintenance, not an improvement, and accordingly they say in that state that while an assessment may be justified for an original pavement of the street, which changed the

street from an unpaved highway to a paved and improved street, it could not be justified and would not be supported by the courts for a repavement, which was a mere repair of the street and should be paid from general taxation.

The authorities in o[illegible]tes, including Connecticut, admit the principle that [illegible]nt may be an improvement and may justify an asse[illegible]nt. We understand that the counsel for the City, in their argument, took the position that repavement was included under the head of repair, and the railroad, because it was obliged to repair, was also obliged to repave. If that were so, the whole ground of assessment, not only against the railroad, but against abutting proprietors, would fall to the ground, because if repaving is a repair it goes under the head of maintenance and cannot be assessed against the property owners. But such is not the rule in this state.

As regards the matter of the construction of the obligation to repair, and whether it does include the obligation to repave, it has been extensively considered by the courts of many states and the United States courts. Leading authorities on this point are:

Chicago v. Sheldon, 9 Wall., 50-56.

State v. Corrigan Consolidated R. R. Co., 85 Mo., 263.

West Chicago Street Railway Co. v. Chicago, 178 Ill., 339, 53 N. E., 112.

Elliott on Roads and Streets, 99, 595-7.

In fact, in the case of Chicago v. Sheldon and other cases, it has been held that where a railroad has been constructed under an original obligation to repair the streets, that that includes their whole obligation as regards it, and that it cannot ever be assessed for a repavement.

Further authorities to the effect that an obligation to

repair does not include an obligation to repave whenever a repavement is ordered by the municipal authorities, are:

Binghampton v. Binghampton & P. D. R. Co., 61 Hun., 479, 16 N. Y. Supp., 225.

Baltimore v. Scharf, 54 Md., 499.

Parmelee v. Chicago, 60 Ill., 267.

Philadelphia v. Hestonville, M. & F. Pass. R. Co., 177 Pa., 371, 35 Atl. Rep., 718.

Norristown v. Norristown Pass. R. Co., 148 Pa., 87, 23 Atl. Rep., 1060.

Oshkosh City R. Co. v. Winnebago County, 89 Wis., 435, 61 N. W., 1107.

City of Williamsport v. Williamsport Pass. R. R., Supreme Court of Pa., May 19th, 1902; Atl. Rep., vol. 52, p. 50.

City of Williamsport v. Williamsport Pass. R. R. Co., Supreme Court of Pa., May, 1903, 55 Atl. Rep., 836.

A provision in the ordinances accepted by the street railway company subjecting it to such regulations as might be adopted by the city in regard to paving and repaving, grading, etc., etc., does not mean that the company shall be required to pave, etc., etc., but that it will not obstruct the city in the construction of the pavement.

Philadelphia v. Hestonville Pass. R. Co., 177 Pa. St., 371, 35 Atl. Rep., 718.

This last decision is in reply to the claim, if any such were made, which so far has not been, that section 9 of the original charter of the company, which reads as follows: "The Common Council of the City of New Haven may from time to time establish such regulations in regard to such railway as may be required for the paving, grading and sewerage,

and the laying of gas or water pipes in and along said streets," gives the city any power to order pavements, or the payment of expense of pavements. The obvious meaning is that the railroad shall comply with such rules and regulations as are required to enable the city to complete operations of paving, grading, sewerage, laying of gas and water pipes, etc., etc. Such a provision can no more be construed to require the company to pave than it could to grade or lay sewers, or gas and water pipes.

One of the latest decisions on the question whether the obligation of the railroad to repair includes the obligation to repave and whether an assessment can be justified on that ground, is the case of State, Dean, Prosecutor v. Mayor, etc., of the City of Paterson, Supreme Court of New Jersey, November, 1901, 50 Atl. Rep., 620, in which the Court uses the following language:—

"Another ground urged is that the street railway was under a duty to pave inside the rails of its track, and for two feet outside, according to the provisions of the ordinance conferring its franchise, and that the property owners should only have been assessed for benefits accruing for the remaining portion of the street. The ordinance in question expresses the duty of the company with regard to the surface of streets to be occupied by it in these words: It 'shall keep and maintain so much of the streets or avenues as are inside of and for at least two feet adjoining the outside of said rails in good and sufficient repair,' etc. There was evidence tending to show that after the railway tracks were laid the City paved the street in question with macadam, which had become worn and out of repair, particularly in that part about three feet out from the railroad track. The repaving was done with red brick laid in concrete, and was recognized as an improvement of a permanent and substantial character. We think this ground of the prosecutor cannot be maintained. To do so, we must give a meaning to the word 'repair' which does not ordinarily attach to it, and we would have to depart from the line of legal precedent.

In the leading case of City of Chicago v. Sheldon, 9 Wall., 50, 19 L. ed., 954, it was held that a stipulation on the part of the street railway company to keep the street in constant good order and repair did not require it to pay a proportion of the expense of paving. And generally it is held that an obligation to repair a street is not an obligation to construct thereon a new pavement. District of Columbia v. Washington & G. R. Co., 4 Am. & Eng. R. Cas., 174; Farrar v. City of St. Louis, 80 Mo., 379; City of Philadelphia v. Hestonville M. & F. P. R. Co., 35 Atl., 718, 177 Pa., 371; Same v. Philadelphia City Pass. R. Co. (Pa.), 35 Atl., 720; City of Binghampton v. Binghampton & P. D. Ry. Co., 61 Hun., 479, 16 N. Y. Supp., 225; 23 Am. & Eng. Enc. Law, 989, and note 1."

The only case cited by the defendant as tending to prove that the obligation to repair might be construed as an obligation to repave whenever a repavement is made by the city, is the case of Conway v. City of Rochester, in which the provision in the original charter was as follows:—

"Every street surface railroad corporation so long as it shall continue to use any of its tracks in any street, avenue, or public place in any city or village SHALL HAVE AND KEEP IN PERMANENT REPAIR that portion of such street, avenue or public place between its tracks, the rails of its tracks, and two feet in width outside of its tracks, UNDER THE SUPERVISION OF THE PROPER LOCAL AUTHORITIES, and WHENEVER REQUIRED BY THEM TO DO SO, AND IN SUCH MANNER AS THEY MAY PRESCRIBE. In case of the neglect of any corporation to MAKE PAVEMENTS OR REPAIRS after the expiration of thirty days notice to do so, the local authorities may make the same at the expense of such corporation, and such authorities may make such reasonable regulation and ordinances as to the rate of speed, mode of use of tracks, and removal of ice and snow, as the interests or convenience of the public may require. A corporation whose agents or servants willfully or negligently violate such an ordinance or regulation, shall be liable to such city or village for a penalty not exceeding five hundred dollars, to be specified in such ordinance or regulation.' (L., 1890, Ch. 565, sec. 98; as amended, L., 1892, Ch. 676, sec. 98.)"

It will be noted that the language is very different from the language used in our own act, sec. 6, Laws of 1893. The obligation is to repair in such manner as they (speaking of the municipal authorities) require, and adds, in the next sentence in case of the neglect of any corporation "to make pavements or repairs," etc., that sentence clearly enlarging the meaning of the previous sentence. This last clause is particularly referred to in the opinion as showing that not only ordinary repairs, but repavement was required, in the opinion of the court. (See page 41.)

The same court, in the case of Gilmore v. City of Utica, 121 N. Y., 672, had occasion to construe an act requiring in terms repair, and used the following language:—

"The Utica City Railroad Company, to whose rights and franchises the Utica Belt Line Street Railroad Company has succeeded, was organized under the railroad act of 1850, and it is provided in subdivision 5 of section 28 of that act that a railroad company may construct its road 'along or upon * * * any street or highway, but that the' company shall restore the street or highway * * * touched, to its former state or to such state as not unnecessarily to have impaired its usefulness."

"It seems to be supposed by the learned counsel for the plaintiff that under that section the duty devolved upon the railroad company to do the paving between its tracks and for two feet on either side thereof. It is undoubtedly true, according to the decisions of this Court and of the Supreme Court, that under that provision a railroad company is not only bound to restore a street used by it to its former state, so as not unnecessarily to impair its usefulness, but it is also bound to keep the portion of the street used by it in a reasonable state of repair. That certainly does not bind a railroad company whenever the municipality shall resolve to pave or repave a street to conform its repairs to the absolute directions and requirements of a municipality. In this case, by virtue of the general railroad act, this company would not be required to make the asphalt pavement. If it restored

the street to its former usefulness and maintained it in that condition, it discharged its whole duty under the general railroad act."

Two cases have been cited by defendant more directly connected with the subject in hand than the others cited by it under the head of police power. The first was the case of Lincoln Street Ry. Co. v. City of Lincoln, Neb., 84 N. W., 802, 5th Mun. Corp. Cas., 229. The second is the case of Sioux City St. R. R. Co. v. City of Sioux City, et al., 138 U. S., 98.

In the former case, legislation requiring a railroad to pave the portion of the street between its tracks, and in case of their neglect to do so authorizing the city to do the work and charge the expense to the railroad, was held to be constitutional.

It was claimed in that case that inasmuch as the ordinance of the city giving consent to the construction and operation of the railroad had contained among other things the following provision: "Said railroad shall be so constructed as to present the least practical obstruction to the ordinary public use of the streets and that it shall, when required, conform to the established grades of the streets as now or hereafter to be established when such streets are brought to grade; and further, said railway company shall be subject to all reasonable regulations in construction and use of said railway which may be imposed by ordinance," that that constituted a contract and the legislature could not, without impairing the obligation of the contract, pass a regulation authorizing the city to require such pavement.

It appeared that the legislature had authorized the laying of the tracks in the street on consent of a majority of the people of the city. The Court held that the city itself ha

no right to grant any charter or franchise to the road and no right to incorporate in its consent any stipulation of the character made in this case; that, therefore, there was no contract as claimed, because there was no power in the city to make such contract. The Court expressly refuses to determine whether the act was an exercise of the taxing power or a police regulation. It says "That by such ordinance it (the railroad) derived no other or greater right than a privilege, license, or permission to enter upon the streets for such purpose and its corporate franchises and privileges were not determined and fixed by such ordinances, but by general laws." And further, that "the franchise emanates from the state and where a company is incorporated by the legislature with power to construct and operate a railroad in the city upon the consent of the city in such manner and upon such conditions as the city may impose, and the city, by ordinance, grants the privilege of constructing and operating the same, the grant by the city is a mere license and not a franchise."

The court expressly approves the doctrine of the Coast Line R. R. Co. v. Mayor of Savannah, 30 Fed. Rep., 646, and Chicago v. Sheldon, 9 Wall., 50, but distinguishes the case at bar from these cases. It is apparent that this decision does not bear upon the case at bar, where the right of the railroad was granted directly by the legislature with a specific provision concerning repair.

The latter case, that of Sioux City St. Ry. Co. v. Sioux City, et al., was a case where an ordinance of the city granted the right to the railroad to construct and maintain a railroad on condition of the company paving the space between the rails. The legislature subsequently passed an act requiring all street railway companies in cities to pave between the

rails and one foot outside of their rails at their own expense, and giving the city power to assess this expense. At the time the franchise was granted, section 1090 of the Code of Iowa was in force, which was as follows:—

"Sec. 1090. The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be, at any time, altered, abridged, or set aside by law, AND EVERY FRANCHISE OBTAINED, USED OR ENJOYED BY SUCH CORPORATION MAY BE REGULATED, WITHHELD OR BE SUBJECT TO CONDITIONS IMPOSED UPON THE ENJOYMENT THEREOF, WHENEVER THE GENERAL ASSEMBLY SHALL DEEM NECESSARY FOR THE PUBLIC GOOD."

The Supreme Court said:—

> "Under section 1090 of the Iowa Code, the legislature had the power not only to repeal and amend the articles of incorporation of the company, but to impose any conditions upon the enjoyment of its franchise which the general assembly might deem necessary for the public good. The reservation of this power was a condition of the grant. The City Council could make no arrangement with the company which would not be subject, under that section, to the superior power of the General Assembly."
>
> "Moreover, the city derived from the state alone its power to grant a license to the company. The right to operate the railway in the streets is a franchise obtained through power given to the city by the state, but the state reserved the power to regulate such franchise and impose conditions upon it. It reserved the power to determine the question of the exemption of the company from taxation and to prescribe what burdens should be imposed upon it for the public good in the enjoyment of its franchise."

In this case, no reference is made to the police power, but the Court decided that the power to impose further conditions was unlimited. Under that decision, the legislature might have imposed a prohibitive rental for the exercise of the rights of the company. The privilege which the company exercised was reduced thereby to the grade of a mere license.

In order that that case may be applicable to this one now before the Court, this Court must decide that the mere power to alter or amend charters reserved in Connecticut is equivalent to the reservation under section 1090 of the Iowa Code, that the legislature can, under that power, impose any direct charge which it sees fit against this railroad company, including therein not only obligations to repave the whole street, but a rental which might destroy the value of the property. But this doctrine is contrary to the whole current of the authorities.

We believe, for these reasons, the Sioux City case is not applicable.

It appears to the plaintiff that the claim that the legislature has the power to impose upon this company the obligation to repave under the police power, or under the bare power to alter and amend the charter, is contrary to a long course of well established decisions of courts which are entitled to the greatest respect; that no well considered case can be cited in support of that position unless the previous opinion in this case can be so cited. It is to be noted that Judge Baldwin, in his recent work on American Railroad Law, page 220, lays down the doctrine that a municipality may require a railroad to pave or to contribute to the expense of paving, but he cites the previous opinion of the Supreme Court of Connecticut in this case as the sole authority for

that proposition, and just below there is a warning note. See Fielders v. North Jersey Street Ry. Co., 67 N. J. L., 76; 50 Atl. Rep., 533; 59 L. R. A., 455.

It is desirable, if possible, to bring the decisions of the various states of the Union and of the United States Courts, upon questions of constitutional law and public right, into harmony; if any apparent difference exists, to explain away that difference, if possible. The plaintiff believes that there is such a way.

The question of whether the city has a right to require a railroad corporation to repave cannot be answered categorically one way or the other with safety, without an explanation, as the question depends upon the circumstances of the case. Where to repave is the only way, or the best way, perhaps, to secure and maintain repair, as in many cases it might be, the railroad company may, perhaps, be compelled to repave. The decision of that question by the legislature, or by the proper authorities of the municipality, may in certain cases be final, so that that question will not be open, but it must appear, either explicitly or by direct implication, that the public authority has passed upon that question and has ordered the pavement as a method of repair, but neither the legislature nor the municipality can absolutely impose the duty upon the railroad of repaving any portion of the street, any more than it can impose the duty of repaving the whole of the street, where that cannot be justified as a method of repair.

And an act of the legislature which arbitrarily imposes the cost of such pavement on the railroad without making any finding itself or requiring any finding that such pavement is necessary as a method of repair is a taking of property without compensation and without due process of law.

The Act of 1895, so far as it affects the railroad, followed by the so-called assessment, impairs the obligation of the contract contained in the charter of the corporation and in the act giving the franchise of all the tracks in West Chapel Street. It is true that the state cannot bargain away the police power, and a contract attempting to bargain that away would be void. For instance, no law that could be made would prevent the legislature or the city from imposing regulations designed to prevent cars to be run at a dangerous speed or in a way calculated to injure the public, nor from keeping the cars in a sanitary condition. The state may impose upon the railroad as a condition of its franchise the obligation to perform in place of the state or the municipality a certain portion of the police duties otherwise incumbent upon the public authority. It might as a condition of the original grant, and even does, as in this case, require it to keep in repair a portion of the street. It might require it to keep in repair the whole street, or to build a police building or perform any other police functions. In such case there results a contract. It might also, as a condition of the original grant, require the payment of any sum per mile of the track. In such case there results a duty on the part of the railroad to perform the agreed duty in consideration of the gift of the right, and the public authority cannot impose any other of the police duties incumbent upon itself upon the railroad without impairing the obligation thereof, except so far perhaps as the railroad causes a nuisance which it is necessary to remove.

After such a contract has taken effect the state or city cannot exact a sum of money for the use of the track by the railroad, except so far as it does so under the power of tax, and it makes no difference in such cases for what purpose the city

has incurred the expense for which it requires the money and makes the demand upon the railroad, unless possibly, as previously suggested, the expense becomes necessary to obviate a nuisance created by the railroad. The authorities on this subject have already been cited under the other heads in this case. The leading cases on that point are Chicago v. Sheldon, 9th Wallace, 50 to 56; and the State v. Corrigan, Consolidated Railroad, 85 Mo., 263.

This proposition was laid down in the Chicago case thirty-five years ago and has never been questioned. It has been referred to and been approved by all the leading federal courts in numerous cases and treated as an established fundamental principle of the law. (See Elliott on Roads and Streets, 595 to 597, inclusive.) It is too late to question this law, as it bears directly upon this case. See also upon this point the other authorities hereinbefore cited.

These are all cases where primarily the obligation is to remove a source of danger. That the party is put to expense in so doing, is only an incidental feature. Nowhere throughout the case does it anywhere appear that the plaintiff failed at any time or in any way to fully discharge its duty to repair as laid down in its charter and in the general law. Nowhere does it appear that the plaintiff in error so maintained its tracks or operated its cars as to constitute a nuisance. Nowhere does it appear that the street was in such a condition, whether through the acts of plaintiff in error or other cause, that there was necessity for a new pavement. In the absence of a showing of these facts, there is no ground for the exercise of the police power as against the railroad company. The charter provision and the general law fully guard the public against the danger from the improper maintenance of the company's railroad. Under such circumstances

the police power could not properly be invoked as against the railroad. An act which absolutely compels the assessment of the expense of the cost of the pavement against the railroad without a finding of any necessity or justification therefor in the condition of the railroad or in the condition of the highway cannot be supported as an act of the police power or as an amendment to the charter of the corporation.

Respectfully submitted,

GEORGE D. WATROUS,
TALCOTT H. RUSSELL,
Counsel for Plaintiff in Error.

FILE COPY.

Supreme Court of the United States,

OCTOBER TERM, 1906.

Number 84.

Office Supreme Court, U
FILED.
OCT 29 190
JAMES H. McKENN

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW HAVEN, DEFENDANT IN ERROR.

AMENDMENT TO BRIEF OF PLAINTIFF IN ERROR.

PLAINTIFF IN ERROR, by

GEORGE D. WATROUS,
TALCOTT H. RUSSELL, } *Counsel.*

The Tuttle, Morehouse & Taylor Co., Law Printers

Supreme Court of the United States,

OCTOBER TERM, 1906.

Number 84.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW HAVEN, DEFENDANT IN ERROR.

AMENDMENT TO BRIEF OF PLAINTIFF IN ERROR.

The City of New Haven in its brief has advanced certain claims to which it seems proper that further answers should be made besides those contained in the original brief of the plaintiff in error.

POINT ONE.

In Point C the defendant advances a claim which so far as the Record appears has never been made before. This is to the effect that the plaintiff is estopped from objecting on constitutional grounds to this assessment because, as the

defendant says, "it stood by and permitted the City to expend money in the expectation of being reimbursed by the company". Not only is this claim an entirely new one as far as the Record shows, but there are no facts in the Record upon which it can be based. Bigelow On Estoppel, third edition, page 387, defines estoppel as follows:—

> "An estoppel by matter in pais may be defined as an express or implied admission become indisputable by reason of the circumstance that the party claiming the benefit of it has, while acting in good faith and in accordance with the real or presumed assent of the other party, been induced by it to change his position. And parties may have been EQUALLY INNOCENT in effecting this change of position, or they may NOT have been EQUALLY INNOCENT."

It nowhere appears that the plaintiff in error "did stand by and permit the City to expend money in the expectation of being reimbursed by the company." It does not appear that the defendant did not object to the work in question. It does not appear that the City acted upon the fact that defendant did not object. It does not appear that the plaintiff ever consented to this work. It does not appear that the City was influenced by any silence or consent of the plaintiff. It does not appear that the plaintiff did not appeal from the order for the pavement. It does not appear that any opposition on the part of the plaintiff in error would have been effective. It does not appear that the defendant in error acted on the faith of any express or silent assent on the part of the plaintiff in error. It does not appear that plaintiff had any notice of the proposed order or an opportunity to contest the same. It does appear that the work was of no benefit to the plaintiff in error, but, on the contrary, a damage. In fact none of the circumstances affecting this question appear.

This Court is called upon to exercise its imagination on the subject.

The fact, that no assignment or claim of this sort has ever been made as far as the Record appears or passed upon by the Connecticut court, and that there is no finding on the subject in the Record, would appear to be sufficient to prevent this Court from considering it.

But even if the claim had been made and the Court could imagine that the plaintiff in error had not appealed from the order for the work, there would be no waiver of constitutional rights.

The fact that a citizen or tax payer does not oppose an order for a public work, knowing that the City will expect to assess him for a portion of the expense, involves no waiver of his right of objection to the legality of such assessment when it is attempted to enforce such claim.

An implied obligation to pay for work can only arise where either the work was requested beforehand or the benefit of the work is accepted by the party against whom the claim is made.

An inference of acceptance can only arise where the party has some option in the matter.

Where the work is done by a higher authority which has power to do the act without the consent of the party sought to be charged, no inference of acceptance or agreement to pay can arise.

It must also appear that the work was work which the individual against whom the claim was made was under obligation to do and that the work was beneficial.

In this case the work was not a benefit but a damage, and the plaintiff in error was not under obligation to do the work until ordered to do so by the City, and then only when it was ordered and found to be a measure of repair. In this case the work was not a repair, but, on the contrary, interfered with and rendered repair more difficult.

The Court cannot assume that the City would ever on due hearing have ordered the railroad to do a work which was unsuited to the locality, an injury to the railroad, and which interfered with the proper repair by the road. We claim as a fact that the City would never have made such an order and it cannot be presumed that it would. On the contrary, it must be presumed that it would not have done so.

The case of the City of New Haven vs. The Fair Haven & Westville Railroad Co., 38 Conn., 422, cited under this head, does not bear upon the question. This case was an action brought to recover an assessment for benefits against the railroad duly made. It appeared that the railroad had a right to appeal from the assessment directly and that it had failed to do so, thereby waiving the right to contest the assessment. It also appeared that the assessment was beneficial in fact, and that it obviated the necessity of repair. Both of which facts are negatived in this case.

The questions raised were whether the City had any jurisdiction to make the assessment. The Court said it had because the railroad's rails and right of way were real estate, and that therefore the assessment was valid and must be paid.

This case was subsequently considered by the Supreme Court in the case of Farmers' Loan & Trust Co. vs. Borough of Ansonia, cited in plaintiff's original brief, and the Court in that case said there must be a finding of benefit to justify the assessment, and that so far as the committee making the assessment were influenced by the consideration that the Borough had done work which the railroad was bound to pay, they misconstrued the scope of legitimate inquiry and the assessment was vacated on that ground. As the Court below has not sanctioned any such claim as this, and as it is not fairly presented, it would seem to require no further argument.

POINT TWO.

The defendant in error attempts to retreat from the position taken by the Connecticut Supreme Court in its final decision. See paragraph 3 of the opinion on page 28, that "the act of 1895 was not intended to provide a rule for the assessment of benefits accruing to property owners by reason of public work, nor to provide a basis for taxation."

He now asks this Court to repudiate and overrule that position of the Supreme Court of Connecticut and yet to sustain the judgment based upon that proposition.

In Points D and E he asks this Court to overrule this proposition and hold that the act of 1895 is a valid exercise of the power of taxation, and is an assessment of benefits, and proceeds to make an extended argument and cites authorities, most of which have been cited in the Court below and held insufficient to sustain his position.

If the defendant in error designed to have this Court review this question, it certainly should have filed a bill of exceptions or in some way given notice that it intended to ask for such revision.

There are reasons in the nature of things why the Court cannot undertake to re-investigate that matter. The Supreme Court of Connecticut has decided that this assessment is not an assessment of benefits nor a valid exercise of the taxing power. The reasons which led it to so decide involve not only questions affecting the United States Constitution, but questions affecting the State Constitution and statutes and local laws.

If the defendant in error desires a revision of this ruling it should take direct measures to secure it, and it should be made to appear that the decision of the Court turned upon a question arising under the Constitution and laws of the United

States and upon that question solely, and not upon any question of local law.

A long line of decisions in the Connecticut courts have sustained the proposition that there can be no special assessment without special benefit to the extent of the assessment, and that such benefit must be found to exist by some tribunal, either legislative, municipal or other.

The Supreme Court could not therefore have sustained this charge against the railroad as an assessment without overruling a long and unanimous course of decisions.

Under the circumstances it was compelled to resort to the police power in order to support the assessment at all.

This court can decide whether the charge in question is or is not an exercise of the police power, or whether it is an attempt to exercise the taxing power, because those are general constitutional questions, but it cannot overrule the decision of the Supreme Court of Connecticut that it is not an exercise of the taxing power, decide that it is an exercise of that power and that it is valid as such because the question of the validity of such exercise is a question to some extent of local law.

The few additional cases cited in the plaintiff's brief in this court under this claim which have not been considered in the brief of the plaintiff in error do not seem to bear upon the point at issue, even if the Court considered itself at liberty to consider them.

Brown vs. Drain in the 112 Fed. Rep. has no bearing whatsoever as far as the plaintiff can see.

Davidson vs. New Orleans, 96 U. S., simply states the rule that due process of law does not require an assessment by the court, and that this court cannot investigate mere questions of the amount or justice of an assessment. Neither of these propositions are made the basis of any claim of the plaintiff in error in this case.

Bridgeport vs. City of New Haven, 36 Conn., decides that an assessment must be based upon benefits; that where there are no benefits there can be no assessment, and that benefits must be direct and not indirect. The assessment in this case was decided void.

Shreveport vs. Prescott, 51 La. Ann., 1895, 46 L. R. A. 193, did not raise any question of constitutionality. It simply decided that the amount assessed against the railroad should be deducted from the amount of the whole assessment before the amount provided by the statute should be assessed against the adjoining proprietors.

POINT THREE.

In Point 2, A and B, the plaintiff again attempts to raise the question as to the construction of the obligation to repair contained in the plaintiff's charter, claiming that that is equivalent to an obligation to repave. The defendant in error attempted to persuade the Connecticut Court to take this view, but it refused to do so, and we do not understand that it can again raise that question here; nor do we understand that this court in order to sustain the judgment is at liberty to disregard the ruling of the court below and adopt a construction of the charter provision which the Connecticut Court has refused to adopt. This would involve questions of construction by the courts of the meaning of the Connecticut statute.

The defendant in error in this connection makes a very singular claim. He says that inasmuch as the Superior Court on the first hearing decided that the railroad was obliged to repave when ordered to do so by the city, and no error has been claimed concerning this, that this court is in some way bound to accept that ruling. As the judgment in that case, which was completely in our favor, was entirely set aside, it is not easy to see how the plaintiff can claim that any ruling

contained in a judgment which has been vacated in toto by the court can be binding on us. We take out this writ of error from the judgment of the court of highest resort. As a matter of fact, the defendant in error is incorrect in his statement that we have not questioned that ruling, as will appear by reference to assignments 5, 9, 10 and 13, page 98 of the Record; assignment 29, page 100; assignment 8, page 97; assignment 13, page 98; assignments 13 and 14, page 5; and assignments 27 and 28, page 7.

The few additional cases cited under this head do not tend to sustain the contention of the defendant in error, even if the court were at liberty to consider it.

Weed vs. Common Council, 26 Miscellaneous Reports, 208, is a case where the tax payers sought to compel the railroad to pay the cost of paving between the rails and two feet on either side, and the court dismissed the complaint on the ground that the railroad had been specially exempted by law from such payment. All general remarks in the case not bearing upon this question are mere obiter.

Reading vs. The United Traction Co., 202 Pa. State, 571, cited under this head, expressly endorses and approves the doctrine laid down in the Fielder's case, cited in plaintiff's brief, that is, that the railroad cannot be ordered to make a new pavement unless it can be fairly required under the circumstances as a necessary repair. This case is cited on the plaintiff's brief, page 87.

As to Bowditch vs. New Haven, 40 Conn., 511, that was a case where the adjoining proprieters claimed that they were not compelled to pay an assessment because the railroad company had not been assessed, and the Supreme Court said that they could not make that objection.

The case of City of New Haven vs. Fair Haven & Westville Railroad Co. has been sufficiently considered under another head in this amendment to the brief.

In People ex rel Detroit vs. F. S. & E. R. R. Co., 41 Mich. 413, the question was merely one of measurements and no question was involved or decided concerning the nature or validity of the assessment.

People ex rel Scott vs. Pitt, 169 N. Y., simply raises the question of the constitutionality of an assessment by the front foot for a sewer. The question is not raised in this case.

The original act, of which sections 3837 and 3838, quoted on pp. 11–12 of plaintiff's brief, are intended as substantial re-enactments, is chapter 21, section 2 of the Public Acts of 1863, which is as follows:—

Sec. 2. Every horse railroad company which shall have constructed, or shall hereafter construct any horse railroad in the street or streets of any city or town in this State, shall be, and is hereby, required to grade and keep in repair the railroad track and railroad way, and the surface of such street or streets adjoining the rails of such railroad, for a space not less than two feet in width on each side of each rail, and to properly construct all cross-walks in such manner that carriages, wagons, and other vehicles, can safely and conveniently cross or turn off from such track; and in case of injury to any person, animal or vehicle, arising from any defect in the grading or repair of such railroad, railroad track, railroad way, or of the surface of any street adjoining the rails of such railroad, for a space not less than two feet in width on each side or each rail, no action shall be maintained against such city, or town, for such injury."

Respectfully submitted,

PLAINTIFF IN ERROR, by

GEORGE D. WATROUS,
TALCOTT H. RUSSELL, } *Counsel.*

FILE COPY.

Office Supreme Court, U. S.
FILED.
OCT 29 1906
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1906.

Number 84.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW HAVEN.

BRIEF FOR DEFENDANT IN ERROR.

LEONARD M. DAGGETT,
E. P. ARVINE,
Counsel for Defendant in Error.

The Tuttle, Morehouse & Taylor Co., Law Printers

Supreme Court of the United States,

OCTOBER TERM, 1906.

Number 84.

THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW HAVEN.

BRIEF FOR DEFENDANT IN ERROR.

I.

STATEMENT OF CASE.

Counsel for defendant in error have found it convenient to divide abstract and statement of the case into the following four parts:

(a) General statement of case;

(b) Explanation of the transcript of record;

(c) Historical relation of facts;

(d) Parts of defendant's charter and such other special or general legislative enactments as are material on any of the points raised.

(a) General statement of case.

This is a writ of error to the Supreme Court of Errors o Connecticut. The case arose by an application of the rail road company to the Superior Court for relief from a assessment made upon it by the City of New Haven for portion of the expense of constructing an asphalt pavemen on West Chapel Street, in which street the railroad compan had a double line of track. The whole of the pavement wa constructed by the city and the city assessed against the rail road company the cost of construction of that part of th pavement included within the tracks of the company and tw feet on either side thereof. In the cost of the pavement wa included the sum paid to the Boston Asphalt Company b the city for the laying of the asphalt surface, and by th contract with the Boston Asphalt Company that compan was bound to maintain the surface in repair for ten years

The assessment so made by the city was expressly author ized by the Special Act of July 1st, 1895 (see page 13 o this brief). The case has been tried three times in th Superior Court and been heard three times on appeal in th Supreme Court of Connecticut. On the first trial in th Superior Court it was held that the Special Act of 1895 ha been repealed by the Special Act approved April 28th, 189 (see page 15 of this brief) and the assessment was practi cally annulled. On appeal to the Supreme Court this rulin of the Superior Court was held to be error, and on th second trial the Superior Court confirmed the assessmen as originally made by the city. On the second appeal t the Supreme Court it was held that there should not b included in the assessment such sum as the city had paid fo the ten year guaranty of repair, and the case was remande that the cost of the agreement to repair might be deducted.

After the second judgment of the Supreme Court the railroad company asked leave to amend its original application, in order to lay a better ground for claims of law which had already been presented. Leave to amend was denied by the Superior Court and on the third trial the Superior Court determined the cost to the city of the agreement to repair the pavement and deducted a proportionate amount thereof from the assessment, and after such deduction confirmed and established the assessment. On appeal to the Supreme Court the action of the court in refusing permission to amend the application and in confirming the assessment after such deduction was confirmed.

(*b*) *Explanation of the transcript of record.*

The transcript of record in this court is in such bewildering and unnecessary confusion that we feel it our duty to state here, in natural order, such parts of the record as need be consulted, and make such statement in the form of an index. The material portions of the record are as follows:

	Original.	Print.
Original application to Superior Court...	202	27
Amendment to application.....	217	39
Exhibit A (found on original p. 206, print 30) and paragraphs 14 and 16 of the application were stricken out on motion, as will appear by reference to	219	40–41
Answer of defendant and amendment thereto	222	43
Motion for leave to amend application ...	285	91
Memorandum denying leave to amend ...	286	92
Memorandum of decision, Superior Court, on third trial	287	92
Judgment of Superior Court, third trial ..	288	93
Finding of facts on appeal, ... which finding includes, as will be seen by the reference in paragraph 2 thereof, the finding on the second appeal	291	95

	Original.	Print.
(excepting only paragraph 8 thereof) which second finding appears on	267	77
The exhibits referred to in the finding on the second appeal are not found on pages specified in the references, but are found, Exhibit F and Exhibits 1, 2, 3, 4, 5 and 6, on	241–259	57–70
Exhibit 9, referred to in paragraph 8 (original page 292, print 96)	300	102
Appeal to Connecticut Supreme Court, ..	302	104
Opinion of Connecticut Supreme Court on third appeal	308	107
Opinion of Connecticut Supreme Court on first appeal	91	13
Opinion of Connecticut Supreme Court on second appeal	193	22
Assignments of error in this court	6	3

(c) *Historical relation of facts.*

The historical relation of facts appears in paragraphs 1 to 37 inclusive of the finding, beginning on original page 267, print page 77, and the finding beginning on original page 291, print page 95, the former finding being by reference made a part of the latter.

1. Facts which are the basis of liability of company to assessment for this pavement.

When the pavement was completed the company maintained a double track line, operated by overhead trolley. This line is a branch of its general system, with which it connects at the corner of York and Chapel streets and which extends to and past the Yale athletic field (Par. 1 of finding, original p. 267, print pp. 77, 78). On October 1st, 1895, the city ordered Chapel Street from York Street, through and beyond the portion occupied by the company's tracks, to be paved, and for such pavement and other similar pavements

made an issue of bonds under Special Act of 1895 (Paragraphs 3 and 4, original p. 268, print p. 78).

Construction of pavements began in June, 1897, and was completed in November, 1897 (Par. 6, original p. 268, print p. 78).

When the pavement was ordered the line was single track, with long turnouts. While the pavement was being constructed, and in anticipation of its completion, the company changed its track to a double line and relaid a large part of its track with new and better rail (Par. 7, original p. 268, print p. 78).

The city paid the whole expense of constructing the pavement, doing part of the work itself and part being done by the Boston Asphalt Company under contract. The railroad company paid no portion of the expense (Par. 10, original p. 269, print p. 79).

2. Facts on account of which company denies liability to assessment.

Before the construction of the pavement the street had been paved in part with crushed stone and in part with Belgian blocks, for which pavements the railroad company had in 1873 and 1874 been assessed, as had been the property owners on the street (Paragraphs 34, 35, original pp. 273-4, print p. 82).

The sheet asphalt pavement is not in general well suited for use where there is a street railway. The new pavement was no direct benefit to the railroad company or its property, but, on the other hand, increased the cost of maintenance and operation, especially the cost of keeping the

pavement between the rails in repair and the roadbed, ties and tracks in repair. The only benefit to the railroad company was the indirect tendency of the improvement to increase the population and consequent traffic in that section of the city (Par. 36, original p. 274, print p. 82).

The railroad company owns no land abutting upon the street (Par. 37, original p. 274, print p. 82).

3. The facts determining the amount of the assessment as finally made by the Superior Court.

The width of the railroad tracks, inclusive of a space two feet wide on either side thereof, is eighteen feet. The length of the railroad is 4,852.5 feet (Paragraphs 1 and 2, pp. 267-8, print p. 78).

At the time this pavement was constructed the city also constructed pavements on certain other streets and apportioned a part of the cost, not including the sum paid to the Asphalt Company, between the several pavements. The amount thus determined spent on Chapel Street is shown by Exhibit 6 (original p. 258, print p. 70). The total cost of the pavement, including the amount paid to the Boston Asphalt Company, was $93,787.49 (Par. 30, original p. 272, print p. 81).

The amount of the assessment made by the court of common council was obtained by dividing the total cost of the pavement by the number of square yards laid and charging the railroad company with such cost per square yard for a strip eighteen feet in width for the length of the railroad line in West Chapel Street. The amount which the bureau of compensation recommended to be assessed, and which was

adopted by the Superior Court at the first trial, was obtained by charging sixty cents per lineal foot for each line of track in Chapel Street (Paragraphs 31, 32, original p. 273, print p. 81).

The Boston Asphalt Company as a part of its contract agreed to maintain the pavement in good condition for ten years (original p. 249, print p. 63).

The contract price for each square yard of surface paid was $3.30 (original p. 253, print p. 66). The price so fixed included both original contract and cost of maintenance (Par. 3, original p. 291, print pp. 95-6).

The Asphalt Company in figuring its bidding price figured original construction at $2.93 per square yard and maintenance for ten years at 37 cents per square yard, and its bid was based upon such calculation. The price so figured for original construction was a reasonable and proper price (Paragraphs 4, 5, original pp. 291-2, print p. 96).

Long before this controversy arose, the Asphalt Company, the city and the surety on the Asphalt Company's bond all agreed that the contract might be amended, separating the original cost of construction from that of maintenance and fixing them at $2.93 and 37 cents per square yard respectively. (See paragraphs 8, 9, original p. 269, print pp. 78-79; paragraphs 6, 7, 8, original p. 292, print p. 96, and Exhibit 9, original pp. 300, 301, print pp. 102, 103).

The Superior Court on the third trial determined 37 cents per square yard to be the proper amount of deduction for the cost to the city of the agreement to maintain the pavement in repair, and after making such deduction confirmed and established the assessment at the sum of $33,288.15 (Par. 10, original p. 292, print p. 96).

4. The procedure of the City in laying the assessment.

A large part of the finding is devoted to a relation of the various steps in the process by which the assessment was finally determined, which need not here be stated in detail. They appear in paragraphs 11 to 33 inclusive (original pp. 269-273, print pp. 79-82) and Exhibits 1, 2, 3, 4 and 5, (original pp. 255-258, print pp. 68-70). They are in substance as follows:

The completion of the pavement and the expense thereof were reported to the director of public works and the court of common council ordered an assessment to be made for this pavement and others constructed at the same time. The bureau of compensation, to whom this order was transmitted, after due notice gave two hearings, at which property owners appeared, but the railroad company made no appearance. The bureau of compensation was advised by the then corporation counsel that under the Act of 1895 they had no discretion, but should make assessments arbitrarily upon both owners of abutting property and the railroad company, and reported assessing the railroad company $36,879 and making arbitrary assessment upon abutting property, against the protest of its owners. This report was referred to the joint standing committee of the common council known as the committee on streets, which after public notice held a hearing and recommended the adoption of the report. The matter then remained pending before the court of common council until after the enactment of the Special Act of 1899 (for which see page 15 of this brief) when the matter was again referred to the committee on streets. That committee again gave public notice and had a hearing and reported recommending a re-assessment by the

bureau of compensation, which was had. At the hearing on the re-assessment a representative of the railroad company appeared and objected for the first time to any assessment against the company. The bureau of compensation then made a report, which appears as Exhibit B annexed to the original application (original pp. 208-213, print pp. 31-35) in which they assessed the railroad company $5,823.

When this report came to the court of common council it was amended by increasing the assessment upon the railroad company to the sum originally reported by the bureau of compensation, namely, $36,879, and the report as so amended was accepted, the orders passed, the assessments laid and approved by the mayor. It is stated in paragraph 33 of the finding that the railroad company had no notice of the purpose or intention of the boards constituting the court of common council to increase the assessment by amendment, and the company was not heard in fact by either of the boards of aldermen or councilmen or by the mayor as to such amendment, or as to the amount of benefit to the property of the railroad company, excepting as it was heard by the bureau of compensation and the committee on streets.

(*d*) *Charter provisions and other legislative enactments material to points raised.*

1. The charter of the plaintiff in error.

Charter of plaintiff in error is found in Special Laws of Connecticut, Vol. V, 370, approved June 20, 1860. Section 9 provides:

> "Sec. 9. The common council of the city of New Haven may, from time to time, establish such regulations in regard to said railway as

may be required for the paving, grading and sewage, and the laying of gas and water pipes, in and along said streets; and said company, in constructing said road, shall conform to the grades now existing or hereafter established by said common council, of the several streets and avenues traversed by said road. Said company shall keep that portion of the streets and avenues over which their road or way shall be laid down, with a space of two feet on each side of the track or way, in good and sufficient repair, without expense to the city or town of New Haven, or the owners of land adjoining said track or way."

Section 13 provides:

"Sec. 13. This act may be altered, amended or repealed at the pleasure of the general assembly."

An amendment approved July 9, 1864, found in Special Laws of Connecticut, Vol. V, 655, is as follows:

"Amending the Charter of the Fair Haven and Westville Railroad Company.

"RESOLVED BY THIS ASSEMBLY, Sec. 1. That the Fair Haven and Westville Railroad Company, be and hereby is authorized and empowered to lay down its track, with suitable turnouts, and to run its cars from York street, through Chapel street westerly to Norton street, in the city of New Haven; thence through Norton street to Whalley avenue, in said city; and also from Whalley avenue through Howe street to Chapel street; the same to be done subject to all the provisions of the ninth section of the original charter of said company

"Sec. 2. That so much of the amendment to the charter of said company, approved July 2d, A.D. 1862, as is inconsistent herewith is hereby repealed.

"Approved July 9, 1864."

Section 1 of the Act approved June 30, 1893, found in Special Laws of Connecticut, Vol. XI, 1040, is as follows:

> "Section 1. That the Fair Haven and Westville Railroad Company be and it is hereby authorized to lay a second track in those streets of the city and town of New Haven which it now occupies with a single track, except West Chapel Street."

Connecticut Public Acts, 1893, chapter 169, being a general law concerning street railways, in section 6 provides:

> "Sec. 6. It shall be the duty of every street railway company to keep so much of the street or highway as is included within its tracks, and a space of two feet on the outer side of the outer rails thereof in repair, to the satisfaction of the authorities of the city, town, or borough which is bound by law to maintain such street or highway. But such authority shall not order said street railway company to use any better or more expensive kind of pavement or material for that part of the street or highway which it is the duty of such railway company to keep in repair, than is used by the town, city or borough upon the remaining width of the street or highway, except for a space of one foot on each side of each rail, unless such better or more expensive kind of pavement or material was required in the order permitting the original location and layout of such railway on such street or highway. Every such municipal authority shall keep a record of all orders as to such repairs, shall serve a copy thereof upon the railway company, and such order shall state the time within which repairs are to be completed, which time shall not be less than thirty days from the service thereof; and upon failure upon the part of the company to make the required repairs within the time fixed by the order, such repairs may be made by the municipal authorities interested, and the expense thereof recovered from the railway company in an action upon this statute."

In section 11 the same act provides as follows:

> "Sec. 11. * * * But such street railway company shall not have any right of appeal from an order made under section six of this act, nor from any order made by said municipal authorities, in any case where such order is not, in terms or effect, a change of a previous order which has been executed, or partly executed, or in view of which such street railway company has incurred expense in preparing to execute."

In section 17 the same act provides:

> "Sec. 17. This act shall take effect upon its passage, and be deemed an amendment to the charters of all existing railway companies operating cars by motive power other than that furnished by locomotives, dummies, or box engines used on steam railroads, and an amendment to the charters of all existing municipal corporations. * * *"

The Special Act approved July 1st, 1895, found in Special Laws of Connecticut, Vol. XII, page 565, provides:

> "AUTHORIZING THE CITY OF NEW HAVEN TO ISSUE STREET PAVEMENT BONDS.
>
> "RESOLVED BY THIS ASSEMBLY: Section 1. That the court of common council of the city of New Haven be and it is hereby authorized and empowered, by a concurrent vote of a majority of the members of each branch of said court, present and absent, subject to the approval or disapproval of the mayor of said city, as provided in the charter of the city, to issue, under the corporate name and seal upon the credit of the city of New Haven, bonds or other certificates of debt, which bonds shall be denominated Street Pavement Bonds of the City of New Haven; the amount of said pavement bonds issued under this act shall not exceed five hundred thousand dollars, and the same, or the avails thereof, when sold as hereinafter

authorized, shall be appropriated by said court of common council to the payment of any expense incurred by said city, in the original construction in said city of new and so-called permanent pavements; but no portion of said bonds or avails shall be used for any other purpose whatsoever. Any avails of the sale of said bonds may be temporarily borrowed by the city, as provided in section eighty-seven of city ordinances, for the purpose of meeting current expenses of the city; *provided*, said temporary loans shall not in any way interfere with the use of said funds for the purpose of permanent pavements, nor shall any loan be made for a period of more than four current months. Of the bonds issued at any time by said city one-quarter shall be payable five years from date, one-quarter ten years from date, one-quarter fifteen years from date, and one-quarter twenty years from date. Said bonds shall be prepared, signed, and authenticated in such manner as the said court of common council may determine, and they shall bear interest at a rate not exceeding four per centum per annum, payable semi-annually, and may be sold from time to time under the direction of the mayor and board of finance of said city. And said bonds or certificates, when issued as aforesaid, shall be obligatory upon the said city of New Haven to all intents and purposes, and may be enforced and collected in the same manner and to the same extent that debts contracted by municipal corporations in this state are enforced."

"Sec. 2. All pavements laid by authority of this act shall be laid upon the credit of said city, and under the direction and control of its common council, and said city shall have power to collect a part of the costs of such pavements from the persons and parties, and in the manner hereinafter provided, to wit: On all streets or parts of streets upon which abutting land owners have never paid the city any assessment for a pavement; such land owners on each side of such streets, or parts of streets, shall be assessed and shall severally pay to

the city the cost of one square yard of such pavement as shall be laid for every foot of such abutting land. On all streets or parts of streets upon which abutting land owners have paid to the city assessments for pavements heretofore laid, such land owners on each side of such streets or parts of streets shall be assessed and shall severally pay to the city the cost of three and one-half square feet of such pavement as shall be laid for every front foot of such abutting land, and all public abutting land shall be assessed at the same rate as like private abutting land, hereinbefore described. On all streets occupied by the track, or tracks, of any railway company, or companies, said company or companies shall be assessed and shall severally pay to the city the cost of paving and repaving the full length, and nine feet wide for each and every line of track of such railway or railways, now existing, or that may hereafter be laid in any street of said city. All such assessments on the hereinbefore described abutting land owners and railway companies shall be payable at such time or times as may be determined by the court of common council. All the cost of such pavements as may be laid under the provisions of this act, above the costs collectible from the abutting land owners and the railway companies, as hereinbefore provided, shall be paid by the city, which shall have and own all materials removed when old pavements are reconstructed or repaired, and all collections from said abutting land owners, said railways, all the premiums on said bonds, and the proceeds of the sale of such old materials, shall be added to the proceeds of the sale of said bonds to be used exclusively for the construction of said permanent pavements.

"Approved, July 1, 1895."

The Supplemental Act approved March 24th, 1897, found in Special Laws of Connecticut, Vol. XII, page 780, provides:

"EXTENDING THE POWER OF THE CITY OF NEW HAVEN UNDER THE RESOLUTION APPROVED JULY 1, 1895, AUTHORIZING THE CITY OF NEW HAVEN TO ISSUE STREET PAVEMENT BONDS.

"Resolved by this Assembly: Section 1. That the city of New Haven is hereby authorized and empowered to expend the proceeds of the street pavement bonds authorized by the resolution of this assembly, approved July 1, 1895, in payment of all sums of money due under any contract entered into by said city for the construction of new and so-called permanent pavements, although said contracts shall include a clause by the party contracting to build said pavements, to keep the same in repair for any period of years not exceeding fifteen.

"Sec. 2. In estimating the cost of each square yard to be assessed against the persons and railroad companies mentioned in section two of said resolution, the entire cost of laying the pavement, and the agreement to keep said pavement in repair for a period not exceeding fifteen years, shall be considered.

Approved, March 24, 1897."

The Special Act approved April 28th, 1899, found in Special Laws of Connecticut, Vol. XIII, page 181, provides:

"AN ACT CONCERNING PERMANENT PAVEMENTS IN THE CITY OF NEW HAVEN.

"Be it enacted by the Senate and House of Representatives in General Assembly convened:

"Section 1. The court of common council and the board of finance of the city of New Haven shall annually assess upon the grand list one mill on the dollar for the paving of streets, and the receipts from said assessments, and from all other assessments resulting from the construction of street pavements herein provided for, shall only be expended in payment for the original construction of pavements herein enumerated.

"Sec. 2. Benefits and damages shall be laid under the control of the court of common council and assessed by the bureau of compensation of the city, as provided in the charter of said city, for or against all owners of property, abutting upon or adjoining the streets on which such pavements are constructed; which assessment for such benefits shall not exceed per lineal foot of frontage seventy-five cents for dimension granite block pavement, sixty cents for asphalt pavement, fifty cents for vitrified brick pavement, and twenty cents for crushed stone pavement, if said bureau shall find that the property is benefited to at least that amount; provided, however, that no assessment shall be laid unless the granite block, asphalt, and vitrified brick pavements shall each be provided with not less than four inches in thickness of concrete cement foundation, and that all the pavements named be provided with vitrified brick gutters.

"Sec. 3. An assessment of benefits and damages to be laid for the pavements already constructed and laid in the city of New Haven, upon Ashmun, Orange, Trumbull, Wooster, and West Chapel streets, shall be laid in accordance with and under the provisions of this act, and the property owners shall be assessed in accordance therewith, irrespective as to whether or not brick gutters have been laid on said streets.

"Sec. 4. All pavements laid under the authority of this act shall be laid upon the credit of the city of New Haven and under the direction of its court of common council; and said assessments shall be collectible and payable, and liens laid to secure the same, at the same time and in the same manner as are the taxes upon the grand list of said city.

"Sec. 5. Any party or parties who shall be aggrieved by any assessment laid against them under this act shall have the right to appeal to the superior court therefrom, as provided for in section eighty-seven of the charter of the city of New Haven passed by the general assembly at its January session, 1897.

"Sec. 6. This act shall be regarded as an amendment to the charter of the city of New Haven, and

all acts and parts of acts inconsistent herewith are hereby repealed.

"Sec. 7. Nothing herein contained shall prevent the city of New Haven from issuing bonds for street pavements in accordance with the power conferred by chapter 389, special laws of 1895.

"Sec. 8. This act shall not affect the liability of street railway companies under the general laws.

"Approved, April 28, 1899."

The charter of the defendant in error, the city of New Haven, as revised by Special Act approved June 2d, 1897, is found in Special Laws of Connecticut, Vol. XII, page 1115. Following are certain provisions thereof defining the power and procedure of the city in the premises:

"Sec. 82. The bureau of compensation shall estimate the total probable expense of taking such land or of making such public improvement, or of discontinuing such highway, or establishing such building line, and shall estimate how much of said amount should be paid by each person whose property is specially benefited by the proposed measure, and how much should be paid to each person whose property is damaged thereby. All assessments shall be for the excess of benefits over damages, if any, or *vice versa*, as the case may be. Said bureau shall make a report of its doings to the department of public works, and said department shall report its doings to the court of common council, in writing, and shall annex thereto a survey showing the particular designation of the land to be taken or the layout of the proposed public improvement."

"Sec. 83. Said court of common council may accept said report and adopt such layout or assessments, or may modify the same as it may deem best, and when such report or modification shall have been accepted and recorded in the records of the court of common council, * * * * * then each of said assessments shall be legally deemed to have been made, * * * * *."

"Sec. 87. Any party who shall be aggrieved by any order of common council, making any such assessment of benefits or damages, * * * may make written application for relief to the superior court, * * * . Said court may, * * * inquire into the allegations of such application, and may confirm, annul, or modify the assessment or other action therein complained of, or make such order in the premises as equity may require, * * * ; and said court may inquire into the validity of all of the proceedings upon which said assessment or other action is based. * * * * ."

"Sec. 135. The city of New Haven shall be a highway district, and the court of common council shall have sole and exclusive authority and control over all streets and highways, now or hereafter existing within the limits of said city, and shall have sole and exclusive power to lay out, make, or order new highways and streets within the limits of said city, and to alter, repair, and discontinue all highways and streets now or hereafter existing within the limits of said city. * * * . Said court of common council is hereby authorized and empowered to order, lay out, construct, repair, and alter public squares, parks, streets, highways, sewers, gutters, drains, bridges, and walks, except as herein otherwise provided, whenever and wherever, in the opinion of said court of common council, the public good shall so require, and to order the paving, macadamizing, or other improvement of any street, alley, or highway within said city. * * * . The department of public works shall execute, and is hereby empowered to execute, all orders of the court of common council with reference to matters contained in this section. The court of common council may, upon the execution of any order for the paving, macadamizing, or other improvement of any street or highway within said city, or upon the construction or alteration of any public sewer or other public work, assess upon the persons whose property is, in the judgment of said court, especially benefited

thereby, after reference to the board of compensation, and report thereon, as hereinbefore provided, a proportional and reasonable part thereof, and shall estimate the particular amount of such expense to be paid by every person upon such assessment. * * * * *."

II.

POINTS AND AUTHORITIES.

A.

THE OBLIGATION TO REPAVE WHEN ORDERED SO TO DO WAS IMPOSED UPON THE COMPANY BY LAW PRIOR TO THE ACT OF 1895. THIS PROPOSITION OF LAW WAS AFFIRMED BY THE STATE COURT AND HAS NOT BEEN MADE SUBJECT OF ASSIGNMENT OF ERROR IN THIS COURT.

The charter of the company (see page 9 of this brief) provided that it should keep the space between its tracks and two feet on each side in good and sufficient repair without expense to the city or town of New Haven. This provision, long before the general law of 1893 was enacted, was practically construed as requiring the company to lay a new pavement or pay for the expense thereof.

Bowditch vs. New Haven, 40 Conn., 511 (1873).

In this case, a property owner on Whalley Avenue appealed from an assessment of benefits for a pavement, alleging as a reason of appeal that the horse railroad, this same plaintiff company, had not been assessed for the improvement, claiming that it should be so assessed because of the requirement in its charter to keep the pavement in repair. The pavement did not cover the portion of the street occupied by the tracks. This claim is considered in the opinion of the Court, where this language is used:

> "The railroad company * * * stands upon a different footing. They are required by their charter to maintain that part of the highway occupied by their track, and a space two feet wide on each side. The charter and ordinances contemplate their paying their just proportion of the whole cost. The assessment against them rests not so much upon the ground that their property has been enhanced in value, as upon the ground that the City has done certain work that they are legally bound to pay for."

City of New Haven vs. Fair Haven & Westville R. R. Co., 38 Conn., 422 (1871).

In this case it appeared that the City had laid a Belgian pavement in Chapel Street, including that part occupied by the company's tracks, and had assessed against the company a part of the cost thereof as a benefit. The action was for the recovery of the sum so assessed and the judgment against the company was sustained. It was held that the rails, sleepers, ties and spikes of the company's tracks were "property" within the meaning of the city charter authorizing assessments of benefits. The company urged in defense that its property should be exempt from assessment because of the charter provision requiring it to keep that portion of the street in repair; but the court held that such defense could not properly be made as the company was estopped therefrom by having permitted the city, without objection, to do work which, under the company's charter, the city might have ordered the company itself to do.

It will be noticed that in this case the work was the construction of a new pavement, not merely the repair of a former pavement.

Section 6 of the General Law of 1893 (see page 11 of this brief) provides that it shall be the duty of every street railway company to keep its portion of the street in repair to

the satisfaction of the authorities of the city; and further that the city authorities shall not order the company to use on its portion any better or more expensive kind of pavement or material than is used by the city on the remaining width of the street. The latter provision clearly shows that the construction of a new pavement of the same kind as that laid on the rest of the street might be ordered by the city. It is our belief that this law of 1893 did not, in requiring repaving, change the obligation of the company, but that it was a practical construction or interpretation by the legislature of previous charter provisions exactly similar in language to the requirement of the first part of section 6 of the law of 1893.

But whether this is so or not is immaterial, because the general law of 1893 was expressly made an amendment to the charters of all existing street railway companies (see page 12 of this brief).

The plaintiff company now claims that the special act of 1895 is unconstitutional and a violation of its contract, in that it imposes an additional burden, namely, the burden of repaving instead of repairing. But that such burden was imposed by the general law of 1893, if not by the company's charter, has been held in this case from the very beginning.

On the first trial of the case in the Superior Court, the following claim of law was made by the City:

> "45. That by the provisions of its charter and by general law, the plaintiff company prior to the passage of the act approved July 1st, 1895, was subject to the legal obligation to repave the space between its tracks and two feet on each side thereof, or nine feet in width, for each line of track, when ordered so to do by the city." (Record, page 56, side page 240.)

This claim of law was allowed by the Superior Court. (Record, page 57, side page 241.)

The first appeal to the Connecticut Supreme Court was taken by the defendant city, in which the Supreme Court found error in the denial of other claims of law made by the City, and consequently there was no occasion for the Supreme Court to consider this claim which had been allowed by the lower court. The claim thus made on the first trial and allowed by the trial court has never been specifically assigned by the plaintiff as error and the Connecticut Supreme Court has therefore never had occasion to pass specifically upon it. It stands, therefore, as a construction of the plaintiff's charter and of the law of 1893 by the state courts.

This construction by the Connecticut courts of their own legislation can never be made the basis of a claim of error by the plaintiff in this Court.

The obligation to repair has been held in other jurisdictions to include the obligation to repave.

Washington, etc., Railroad Company vs. District of Columbia, 108 U. S., 522.

In this case the charter of the company required it to keep the tracks and a space two feet outside thereof "at all times well paved and in good order, without expense to the United States or to the cities of Georgetown or Washington," and an order imposing upon the company the expense of paving such portion of the highway with more expensive material than the rest of the street was upheld.

Conway vs. Rochester, 157 New York, 33.

In this case the law requiring railway companies "to have and keep in permanent repair that portion of the street

* * * under the supervision of the proper legal authorities and whenever required by them so to do and in such manner as they may prescribe," was held to impose upon them the expense of repaving with new material. Counsel in that case claimed that the construction of a new pavement where none previously existed, and pavement of new and different material from that existing at the time of the contemplated improvements, is not a repair of a street as that term was used in the act referred to; but the Court by Parker, Ch. J., says, on p. 39, upon this point:

> "* * * the local authorities of that city were vested with the authority of determining when the repairs should be made, and thus empowered, the local authorities did determine that repairs should be made and the character of them. They decided that the entire street should be repaved and that the new material to be used should be asphalt. This they had the right to do, and when this determination was made the statute intervened and commanded that the Rochester Railway Company should make the repairs thus ordered, under the supervision of the local authorities."

Wood vs. Common Council, 56 N. Y. S., 105, 26 Misc., 208 (Special Term, Feb., 1899).

In this case *Conway vs. Rochester* was cited with approval.

People ex rel Detroit vs. F. S. & E. Railway Company, 41 Mich., 413.

In this case the company was by charter required "to keep the surface of the street inside the rails and for two feet four inches outside thereof in good order and repair." In a mandamus to compel the defendant to repave its portion of the street it was assumed by both parties that the obligation to repair included that of paving.

27 Am. & Eng. Encyl. of Law, 2nd ed., page 39, *et seq.*

Elliott on Roads & Streets, Section 722, *et seq.*

Reading vs. United Traction Co., 202 Pa. St., 571.

In the latter case, an earlier Pennsylvania case was quoted where it was said:

> "The duty to repair, where it exists, extends to the replacement of an old pavement by a new one of different and improved kind * * * The company is bound to keep pace with the progress of the age in which it continues to exercise its corporate functions."

The cases cited by the plaintiff to the contrary are most of them decisions construing special language of statute, charter, or ordinance, or holding that a municipal corporation, without legislative authority, cannot require repaving where the original authority or ordinance enacted in pursuance thereof required only repairing.

The only case in this court which can be cited by plaintiff in error to the point that power to compel repair does not include repaving is easily distinguished from our case and is instructive.

The City of Chicago vs. Sheldon, 9 Wall., 50.

From the opinion of *Mr. Justice* NELSON it appears that the company was chartered to construct a railway in Chicago in such manner and with such rights as the common council *might by contract with the company prescribe.* The seventh section of the city ordinance constituting the contract between the city and the company provided that it should keep a defined portion of the street in good repair and condition, *"in accordance with whatever order or regulation respecting the ordinary repairs thereof may be adopted by the common council of said city."* This quotation is from

the first citation of the ordinance in the opinion of the court and the court held that the company was not obliged, when ordered so to do, to pay an assessment for a new pavement. The court, in ascertaining the meaning of the seventh section, further compares it with other ordinances giving permission to the same company to operate in other streets, in which was contained the further provision that the company should, when any new improvement or paving should be ordered, make the improvement for its portion of the street.

It is a question of intention and the language of Section 6 of the General Law of 1893 clearly shows the legislative intention to impose the burden of repaving when so ordered.

B.

THE SPECIAL ACT OF 1895 IMPOSES NO NEW BURDEN UPON THE PLAINTIFF COMPANY.

The plaintiff company was, by the law as it existed prior to 1895, subject to the duty of repaving its portion of the street when ordered by the City so to do, provided no more expensive material was required than was used on the remainder of the street. The Act of 1895 merely directed that in certain classes of pavements the City might itself perform the work instead of ordering the work done by the company and might assess against the company the cost thereof. However else this may be justified, it is certainly a valid exercise of the police power. While the reasons influencing the legislature do not appear of record, the State certainly has power to say by what public agency its highways shall be constructed. It is not for any court to say whether there may not have been good reasons in the interest of public safety and convenience that permanent pavements,

so-called, should be constructed throughout the full width of the street by one contractor or agency rather than by two and at one time rather than at different times.

It is hardly necessary to cite to this court any of the many instances in which the legislature has properly required work to be done by one public agency and partially paid for by individuals or quasi-public corporations. The abolition of grade crossings, the construction and repair of sidewalks, curbs and gutters, the sprinkling of streets and the drainage of low lands are all instances.

Woodruff vs. N. Y. & N. E. R. R. Co., 59 Conn., 63;
N. Y. & N. E. R. R. Co. vs. Waterbury, 60 Conn., 1;
Westbrook's Appeal, 57 Conn., 95;
Doolittle, States Attorney, vs. Branford, 59 Conn., 402;
N. Y. & N. E. R. R. Co., vs. Bristol, 151 U. S., 556;
Cooley, Constitutional Limitations, 7th ed., pp. 733-4;
James vs. Pine Bluff, 49 Ark., 199;
Cooley on Taxation, 3d ed., page 589;
Hagar vs. Supervisors of Yolo County, 47 Cal., 222.

On page 733 of *Cooley on Constitutional Limitations*, it is said concerning the drainage of low lands:

> "In many other cases, besides the construction, improvement and repair of streets may special taxing districts be created, with a view to local improvements. The case of drains to relieve swamps, marshes, and other low lands of their stagnant water, and of levees to prevent lands being overflowed by rivers, will at once suggest themselves. In providing for such cases, however, the legislature exercises another power beside the power of taxation. On the theory that the drainage is for the sole purpose of benefiting the lands of individuals it might be difficult to defend such

> legislation. But if the stagnant water causes or threatens disease, it may be a nuisance, which, under its power of police the state would have authority to abate. The laws for this purpose, so far as have fallen under our observation, have proceeded upon this theory. *Nevertheless, when the state incurs expense in the exercise of its police power for this purpose, it may be proper to assess that expense upon the portion of the community specially and peculiarly benefited.* (Italics are ours.)

C.

The Plaintiff Company had its Opportunity to Object to the Construction of the Pavement and is now Estopped to Deny Liability.

The order for the construction of the pavement was made by the City on October 1st, 1895 (paragraph 3 of Finding, Record page 48, side page 230). At that time the Special Act approved July 1st, 1895 was in force and plaintiff company was charged with knowledge that it would be assessed its portion of the cost of construction in accordance with that act. Section 50 of the charter of the City then in force (Spec. Laws Conn., IX, 298), similar to section 87 cited on page 18 of this brief, provided

> "Any party who shall feel aggrieved by any act of the court of common council, or of the board of public works, with reference to laying out, constructing, altering, or improving any public square, park, street, highway, private walk, sewer, gutter, or drain, or by any act of said court or of said board, or of the board of compensation, in making any of the assessments of damages or benefits authorized by this act, may make written application for relief to the superior court to be held in and for New Haven county, * * * * *"

If the pavement was not suited to the conditions, or if its construction was an injury to the plaintiff company, it should have pursued its remedy by appeal. Not having done so, but, on the contrary, *having stood by and permitted the City to expend money in the expectation of being reimbursed by the company, the company is now estopped to deny liability for such reimbursement.*

Fair Haven & Westville R. R. Co. vs. City of New Haven, 38 Conn., 422 (1871).

This case, already cited in this brief, was an action for recovery of an assessment of benefits for the construction of a pavement. It was urged in defense that the assessment could not be made because the company's charter required it to keep the street in repair. The Court said (page 432):

> "It is a very interesting and important question, whether the defendant, by objecting to these proceedings at the commencement, could have practically defeated the whole improvement; but the case before us does not require us to decide that question. The defendant suffered the City to go forward and incur an expense, with full knowledge of the proceedings, without objection at the time. The defendant must have known that the improvement would largely benefit it in the matter of repairs, that the proceeding was under the statute, and consequently at the expense, in part at least, of the parties benefited. There was no reason to suppose that the city was doing the work of the defendant at its own expense, or at the expense of other parties. The presumption therefore is, in the absence of any finding to the contrary, not only that the defendant consented to the making of the improvement by the city, but that there was an implied understanding that the defendant was to bear its fair proportion of the expense. We think,

therefore, that the defendant should be estopped from setting up this claim."

There was no allegation in the complaint that the cost was unreasonable unless it be the allegation of paragraph 12 (Record, page 28, side page 204) that some items were wrongfully included, which allegation has not been found true.

D.

THE ASCERTAINMENT OF THE COST UNDER THE SPECIAL LAW OF 1895 MAY BE REGARDED AS AN ASSESSMENT OF BENEFITS.

It is within the power of the legislature to say what property is benefited by a public improvement and to what extent.

Spencer vs. Merchant, 125 U. S., 345;
Emory vs. San Francisco Gas Co., 28 Cal., 346;
People ex rel Scott vs. Pitt, 169 N. Y., 521.

Since the assessment of benefits is an exercise of the taxing power, the extent and manner of its exercise by the legislature is limited only by the express limitations of the constitution.

In re Madeira Irrigation District, 92 Cal., 296, 27 Am. St. Reps., 106;
Nichols vs. Bridgeport, 23 Conn., 189;
State vs. Travelers Insurance Co., 73 Conn., 255;
Canastota Knife Co. vs. Newington Tramway Co., 69 Conn., 146.

"The reasonableness of its" (the legislature's) "action in any matter within its appropriate jurisdiction is not a matter of judicial question, unless it be plainly apparent that some constitutional right

or fundamental principle of society has been invaded." Opinion of Baldwin, J., p. 152.

Dillon, Municipal Corporations, §§ 76: (4th ed., Vol. II, pp. 935-936), 753.

The Special Act of 1895 in fact provides for notice to the company and a hearing. While the act does not expressly provide for notice, yet the language is that the City shall have power to collect a part of the costs from the persons and parties in the manner hereinafter provided, that is, on all streets occupied by the tracks of any railway company, said company shall be *assessed*. This is substantially a direction that the portion required to be paid by the company shall be ascertained in the same manner that assessments of benefits and damages are ascertained under the city charter,—in other words, that there shall be a reference to the bureau of compensation and notice to the parties interested and a public hearing (City Charter, Secs. 82, 83 and 135) (pp. 17, 18 of this brief).

The benefit which the legislature had in mind, regarding it as an assessment, was that the City undertook the expense of the repavement on the company's portion of the street instead of ordering the company to repave its portion, as it might, under the general law of 1893. The legislature having determined the extent of the benefit, the bureau of compensation and the court of common council had no power except to ascertain the proportion of the cost in accordance with the Act of 1895.

This benefit, the benefit of having work done by the City which the company might have been required to do, is direct

and is therefore assessable upon the franchise of the company.

Bridgeport vs. N. Y., N. H. & H. R. R. Co., 36 Conn., 255;
Lake St. Elevated Railroad Co. vs. Chicago, 183 Ill., 75;
Shreveport vs. Prescott, 46 L. R. A., 193, and Note, 51 La. Ann., 1895.

E.

THE ASSESSMENT DIRECTED BY THE ACT OF 1895, TREATED AS AN ASSESSMENT OF BENEFITS, IS NOT A TAKING OF PROPERTY WITHOUT COMPENSATION OR WITHOUT DUE PROCESS OF LAW.

French vs. The Barber Asphalt Co., 181 U. S., 324;
Brown vs. Drain, 112 Fed. Rep., 582;
Davidson vs. New Orleans, 96 U. S., 97;
People ex rel. Scott vs. Pitt, 169 N. Y., 521 (already cited).

In *French vs. The Barber Asphalt Company* it was decided that the apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage, without any preliminary hearing as to benefits, may be authorized by the legislature, and that such action is not a taking of property without due process of law. The substance of the decision is, that the legislature is the taxing power, and that it has the final authority to decide who is benefited by the improvement and how much. It usually commits the duty of imposing taxes to municipalities or other agencies,

but it may do it itself. It might create a tax district and decide in advance who will be benefited and how much, and may decide by a general act what particular classes of property are or will be benefited in case of certain improvements; and from this decision there is no appeal.

> "The legislature has power to fix such a district itself without any hearing as to benefits, for the purpose of assessing upon the land within the district the cost of a local public improvement. The legislature when it fixes the district itself is supposed to have made proper inquiry and to have finally and conclusively determined the fact of benefits to the land included in the district, and a citizen has no constitutional right to any other or further hearing upon that question."

The definition of due process of law, by Mr. Justice Field, in Hagar vs. Reclamation District, 111 U. S., 701, has been recently restated with approval by this Court.

Turpin vs. Lemon, 187 U. S., 51. See p. 58.

Fallbrook Irrigation District vs. Bradley, 164 U. S. 112, cited with approval the statement of Mr. Justice Miller that there was

> "abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact it would seem from the character of many of the cases before us and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

Appeals from assessments for public improvements seem quite often to be based on the objections now urged by the plaintiff.

Hibben vs. Smith, 191 U. S. 310;
Chadwick vs. Kelley, 187 U. S. 540.

F.

The Special Law of 1895 was an Amendment of the Plaintiff's Charter.

This has been held by the Supreme Court of Connecticut in this case (see Subdivision 5, Opinion of Frentice, J., page 109, side page 311; also record, page 21, side page 104). This being a decision of a Connecticut court interpreting Connecticut legislation it should not now be questioned in this court. We deem it immaterial whether the Act of 1895 was in fact, technically or practically, an amendment of the company's charter, but as this has been included by plaintiff in its assignments of error, a brief discussion may be advisable.

To the point that the Act of 1895 was in effect an amendment to the plaintiff's charter, the Connecticut Supreme Court cited

Bulkley vs. N. Y., N. H. & H. R. R. Co., 27 Conn., 479;
N. Y. & N. E. R. R. Co. vs. Waterbury, 60 Conn., 1.

It might also have cited

N. Y. & N. E. R. R. Co.'s Appeal, 62 Conn., 527, p. 538;
English vs. N. Y., N. H. & H. R. R. Co., 32 Conn., 243.

The plaintiff will contend in this court that the act cannot constitute an amendment because it is a special law and purports to be an amendment of the charter of the City of New Haven. Section 95 of the Revised Charter of the City of New Haven, approved April 14th, 1881, is as follows:

> "Sec. 95. This act shall be a public act, and shall take effect upon its passage." (Special Laws of Connecticut, Volume IX, page 315.)

The act of 1895, being an amendment of the city charter, itself a public act, must be a public act and have the same force as would a general law as to all persons who come within its scope, that is, as to all street railways operating on the streets of New Haven.

G.

The Special Act of 1895, Even Though It be Regarded as Imposing a New Burden, is Constitutional.

If the act be a valid exercise of the police power, it is immaterial, as has been said by plaintiff's counsel many times, whether or not the act be an amendment of the plaintiff's charter. We have attempted to show earlier in this brief that the act of 1895 imposes no new burden upon the company but merely directs that the city do work which it might, under the existing law, require the company to do, and recover the expense thereof from the company. If we are right in this claim, the only occasion for considering the police power is to inquire whether it be a valid exercise of that power in this particular case to require the company to reimburse the city instead of requiring it to do the work. This question hardly seems to merit discussion.

But assuming all that is claimed by the plaintiff company, namely, that the act of 1895 imposes upon the company for the first time the cost of repaving, we yet contend that the act is constitutional.

Many of plaintiff's assignments in error concern the question whether the act of 1895 is an amendment of plaintiff's charter. This question has already been discussed to some extent in this brief. Plaintiff's counsel contended in the state court that the reserved power of amendment was intended to enable the city to prevent the rights and privileges given by the charter from being thereafter used to the injury of the public. In other words, counsel sought to restrict the power of amendment to such measures as might be justified also as an exercise of the police power. This contention cannot be sound. The police power may be exercised in derogation of rights claimed by contract. It must be that the power of amendment covers acts which are not an exercise of the police power; otherwise the power of amendment is ineffective.

The power of amendment is not without some restriction. It may not be exercised to impair the obligation of a contract made by the company pursuant to its charter rights. But the very history of the constitutional reservation of the power to amend shows that it was designed to enable the State to change the obligation of its contract, that is the terms of the corporate charter. This certainly may be done by a legislative measure, passed in good faith, consistent with the scope and object of the act of incorporation and respecting vested rights of property.

Stanislaus County vs. San Joaquin Canal and Irrigation Co., 192 U. S., 201.

See also

Sioux City Ry. Co. vs. Sioux City, 138 U. S., 98;
N. Y. & N. E. R. R. Co. vs. Bristol, 151 U. S., 567;
Spring Valley Water Works vs. Schottler, 110 U. S., 347;
Pennsylvania College Cases, 13 Wall., 190;
Tomlinson vs. Jessup, 15 Wall., 454;
Morawetz, Corporations, Vol. 1, Secs. 1093 to 1114.

That the act of 1895 was a valid exercise of the police power is shown by the authorities cited in the opinion of the Supreme Court of Connecticut in this case. (Record, pages 19, 20, side pages 101 to 104.) See also p. 26 of this brief.

It is not necessary to determine whether the act of 1895 should be regarded as an act authorizing an assessment of benefits, that is of taxation, or one imposing a new condition of the original grant.

Lincoln St. Ry. Co. vs. City of Lincoln, 84 N. W., 802, 61 Neb., 109.

H.

THE EFFECT OF THE PRIOR ASSESSMENTS REFERRED TO IN PLAINTIFF'S ASSIGNMENTS OF ERROR.

The plaintiff has urged as objections to this judgment that it had already been assessed for pavements on certain portions of the street covered by the new pavement. This ground of objection was not stated in the plaintiff's application and was not properly presented under the pleadings to the state court (Opinion of the Supreme Court, Record, p. 25, side page 198; p. 110, side page 313, subdivision 10).

Even if such claim were possible on the pleadings, and even if it had been made to appear, as it was not, that the

earlier pavements were in a reasonable state of repair, yet the plaintiff could not claim on this ground the act of the city to be a taking of its property. It is a case of uncompensated obedience to a police regulation.

New Orleans Gas Light Co. vs. Drainage Commission, 197 U. S., 453;

C. B. & Q. R. R. Co. vs. Drainage Commissioners, 200 U. S., 561;

Chicago St. Ry. Co. vs. Illinois, 201 U. S., 506.

III.

IN CONCLUSION.

This company, after the passage of the act of 1895, permitted the city to order and lay at its own expense this pavement. It made no appearance before the assessing tribunal, the bureau of compensation, and no objection to the assessment until the assessment was recommitted to the bureau of compensation after the passage of the act of 1899. It first claimed in this proceeding that the act of 1899 had repealed the act of 1895; in other words, that the legislature had taken away from the city the right to have itself reimbursed by the company for the expenditure made in the expectation of such reimbursement. It now claims that the city is taking its property without due process of law; but in fact it is seeking to place upon the taxpayers of the city the expense of a repair which, under the general law of 1903, the city might have compelled the company to make. It has come to the Superior Court of Connecticut under these circumstances asking *equitable relief.*

We say that it has mistaken its grievance. If the pavement was not necessary or was not suited to the conditions it should have appealed from the order for the pavement.

LEONARD M. DAGGETT,
E. P. ARVINE,

Counsel for Defendant in Error.